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# The Concurrent Liability in Contract and Tort Under U.S. and English Law: To What Extent Plaintiff Is Entitled to Recover for Damages Under Tort Claim?

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THE CONCURRENT LIABILITY IN CONTRACT AND TORT UNDER U.S.  
AND ENGLISH LAW: TO WHAT EXTENT PLAINTIFF IS ENTITLED TO  
RECOVER FOR DAMAGES UNDER TORT CLAIM?

Phutchaya Numngern

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Master of Laws – Thesis

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Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Master of Laws – Thesis.

Thesis Committee

A handwritten signature in cursive script, likely of Professor Hannah L. Buxbaum, written over a horizontal line.

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## **ABSTRACT**

Both U.S. and English courts have confronted with the concurrent situations mostly occurring in the cases where 1) the plaintiff asks for the recovery in tort claim despite the existence of contractual relationship or 2) the plaintiff asserts contract claim but the defendant contends that the issue at bar should be sound in tort rather than in contract. After studying all relevant cases and academic writings, this thesis found that both U.S. and English systems generally recognize concurrent tort claim as an elective right. The courts have attempted to provide the justified rationales either to allow the plaintiff's tort claim or to apply tort rules according to the defendant's defense. All rationales given are definitely aimed at significant aspects including the protection of parties' expectation, the creation of justice, and the reinforcement of public policy. However, there are also the restrictions on the permissive rule of concurrent claim. The critical limitations on the rights to tort claim are as follows:

Firstly, because both U.S. and English courts generally recognized that the recovery for economic loss is limited only in contract claim, plaintiffs' rights to tort claim for pure economic loss is limited. U.S. law recognized plaintiff's tort claim for economic loss only in the cases of professional negligence and of bad faith breach of contract. However, some courts are attempting to develop and apply the independent duty doctrine to permit more tort claims of negligence especially for economic loss. Furthermore, tort liability for bad faith breach of contract is mainly limited only in the relationship in insurance contract. To prevent an opportunistic breach of contract, this thesis suggests that the concept of bad faith breach should not be limited only in an insurance contract. Similarly, English law invokes the principle of assumption of responsibility that requires the special relationship between the parties in order to grant the award to the plaintiff who assert concurrent claim of negligence for economic loss.

Secondly, it is clear that under English law, the tortious duty of care can be excluded or limited by the exculpatory clause or contractual term of liquidated damages. While English courts refuse to impose the duty of care which is inconsistent with what the parties have agreed in their contract, it is not apparent that U.S. courts entirely refuse to impose tortious duty of care which is inconsistent with what the parties have voluntarily agreed in their contract. As to this approach of English system, this thesis suggests that it would be fair, just and reasonable if U.S. courts apparently adopt and apply this kind of limitation to restrict concurrent tort claim in U.S. jurisdictions in order to sustain the freedom of contract doctrine which has the dominant aim to protect the contracting parties' bargain of interest in allocation of their particular risk in the particular way so far as their interest is not outweighed by the mandatory law or public policy.

Thirdly, it is suggested by scholars' views that the doctrine of efficient breach recognized in U.S. contract law should be taken into account in limiting the imposition of tort liability on the breaching party particularly in commercial transaction if breaching party can prove that nonperformance is economically efficient. This thesis agrees with this suggestion because this would neither lead to the destruction of well-established concept of efficient breach nor bring about the unreasonable consequences that cause harm to the public economic interest.

Lastly, some English courts is inclined to limit the scope of recoverable damages in concurrent tort claim by applying the similar test of remoteness of the breach of contract claim to the tort claim. This restrictive approach aims at the protection of the parties' expectation interest rather than deterrence the wrongful conduct. As for such reason, this thesis suggests that the limitation on the scope of recoverable damages is justifiable only in the case where the tortious duty being imposed by virtue of a contract rather than being imposed by the virtue of provision under a statute or existing independently of contractual terms.



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## **I. INTRODUCTION**

### **A. Concurrent Claim Situations**

Typically, in legal systems around the world, there exist two main sources of obligations including contract and tort. Both branches of law have played an important role in attempting to fully compensate the injured parties for a breach of contract and a breach of duties imposed by law, respectively. Although the laws of contract and tort are separate areas, both have given rise to complicated concurrent liability issues and, thereby, the issue of concurrent claims has become prevalent in judicial practices worldwide, occurring in many different contexts, particularly construction, professional advice, employment, sales of goods and public services.

The core problem relevant to the issue of concurrent claim lies in the legal uncertainties of the plaintiff's rights to compensation due to the fact that both the rules of contract law and those of torts may be applied to determine the damages in the dispute. Especially, when both requirements for contractual and tortious liability are simultaneously satisfied, the question arises as to whether tortious liability may be asserted concurrently with liability for a breach of contract. Stated clearly, it may appear that the contracting party's conduct not only violates the express or implied duties set forth in the contractual provisions but may also violate other duties that are imposed by law. Therefore, it is possible that breach of contractual obligation can give rise to alternative claims in tort. However, it is well to keep in mind that while there may be concurrent liability, it is generally the case that a plaintiff will assert a claim in order to recover for remedies in the alternative. In other words, a plaintiff can seek a remedy under one theory or the other so that he will not have double recovery for remedies based on both causes of action.

While the problems are typically raised when both requirements for contractual and tortious liability are reached, prior to allowing an alternative right, it is important to examine whether the contracting party is liable for damages based on tort law. As we can see in tort law, the tortious liability may be different depending on both the relationship between the parties in different types of contract and the alleged conduct of the contracting party.

In deciding concurrent cases, courts generally begin by considering the existence of tortious liability. Though there are different types of contractual disputes such as construction disputes, malpractice disputes arising from professional services contracts, employment disputes, sales of goods, and other public services disputes, most of these cases mainly involve claims of negligence. This is because negligence has been the central basis for liability in most tort cases.<sup>1</sup> Considering the negligence cause of action, the court will particularly consider the problem regarding the duty of care to determine whether the plaintiff can ask for damages based on negligence. This thesis will mainly examine the extent to what the scope of duty is imposed in some kinds of contracts and the limitations on tortious duty owed by the contracting party.

## **B. An Influence of the Different Rules and Principles to Concurrent Claims**

Contractual and tortious liability are dissimilar in many respects, including the requirement of liability, the scope of remedies, the limitation of action, and the validity of exculpatory clause. These differences influence plaintiffs' choices of remedy. This thesis will explain such differences in order to understand the rules and principles of those core areas of private law and to address the reasons why the contracting party wants to rely on a tort claim instead of asserting breach of contract. Normally, the plaintiff prefers to pursue a tort claim, to

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<sup>1</sup> JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, UNDERSTANDING TORTS 46 (4th ed. 2010).

some extent, due to the different categories of reasons including (1) broader scope of remedies (e.g., damages for emotional distress and punitive damages); (2) more favorable limitations period; (3) getting around a lack of privity; (4) getting around an exculpatory clause.

Additionally, if the plaintiff asserts a tort claim especially when both contractual and tort claim are pleaded in one suit, the court will inevitably undertake the dilemma responsibility to draw the principle of concurrency and find the borderline between such causes of action. This thesis will thereby examine whether the court allows the plaintiff to rely on an alternative tort claim when he wants some advantages of such claim. This is important because the extent to which the court allows the plaintiff to rely on a tort theory will affect the scope of remedies acquired by the plaintiff. Furthermore, the concept and policy of recognition of concurrent claims will be examined by exploring the historical development of concurrent claims.

### **C. Relevant Questions and Scope of Study**

In terms of the right of the contracting party to bring an alternative tort claim in respect of the same subject matter, there are two different authorities both in Civil Law system and Common Law system. The comparison between the two legal systems is definitely worth studying. However, in this thesis I would start by exploring and comparing U.S. law and English law as the examples of common law system. Although they have the similar framework of most of contract and tort law, I found some interesting differences in the conditions and limitations on concurrent liability between contract and tort that will be illustrated and analyzed in this thesis. The law of civil law system will definitely be taken into account in my future works in order to provide a thorough research on concurrent liability between contract and tort.

Additionally, under U.S. common law rules, the doctrine of promissory estoppel is used to protect plaintiffs who had, in their detriment, relied on a defendants' assurances without the protection of a formal contract.<sup>2</sup> Furthermore, the promissory estoppel is originally applied to protect plaintiffs who had, in their own detriment, relied on pre-contractual or non-contractual representation.<sup>3</sup> In case of the borderline between tort and contract law, there are some discussions on pre-contractual liability under U.S. law. It appeared that the doctrine of promissory estoppel is used to impose tort-like liability for bad faith in a contract context. It is suggested that the promissory estoppel is related to the situation where the plaintiff is seeking recovery for loss or damage suffered as the result of reliance on the defendants' promises or representations.<sup>4</sup> Thus, it is noteworthy that tort liability has interfered the realm of contract law in the cases where the courts permit the plaintiff to assert promissory estoppel claim for the damages suffered as a result of his reliance on the defendant's promise or representation occurring during pre-contractual period. Undoubtedly, in such situations the plaintiff cannot ask for contract claim since no contract is actually formed between plaintiff and defendant. All such situations are very interesting however the doctrine of promissory estoppel as a tort-like liability will not be studied in this thesis.

As to the scope and objective of this thesis, the important questions are (1) On what conditions and limitations is the plaintiff permitted to rely on tort claim? (2) What is the rationale for both excluding and allowing tort claim under the concept of concurrent liability? (3) Which

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<sup>2</sup> GRANT GILMORE, *THE DEATH OF CONTRACT*, 70 (Ronald K.L. Collins 2d ed., 1995).

<sup>3</sup> *See* GILMORE, *Id.* at 80.

<sup>4</sup> *See* GILMORE, *Id.* at 97.

approach of both U.S. and English legal system should be taken into account to balance the interests of both the plaintiff and the defendant as well as of public policy?

This paper will profoundly explore and determine both relevant U.S. and English cases as well as academic writing with respect to the extent to which the plaintiff is entitled to rely on tort claim under U.S. and English Law. To begin with, both U.S. and English Law recognize the existence of concurrent liability in its own conditions based on both the difference of the scope of contractual and tortious liability and other contexts or circumstances. In brief, under English law, according to *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL), the House of Lords held that a contract between plaintiff and defendant can lead to an “assumption of responsibility” in tortious liability as long as the contractual terms are “not inconsistent” with a duty of care, while under U.S. law, case law recognized the existence of a free elective concurrence. In *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654 (1958), the Supreme Court of California held that “...it is the rule that where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract...” Regarding the foregoing approaches, this thesis will provide comparative analysis between these two legal regimes. This study will add the element of legal certainty into a legal system of U.S. and English Law and allow both the courts and lawyers as parts of practical sectors to consider the certain rights of the plaintiffs under the issue of concurrent liability. Moreover, from the comparative perspective, this thesis will find what is the qualified right of the parties in such concurrent cases. Apart from the conditions and limitations that are evidently recognized by U.S. and English courts, the question whether any other appropriate conditions and limitations proposed by the scholars should be taken into account to consider the plaintiff’s right to tort claim in concurrent situation will also be examined.



## **II. THE DIFFERENCES BETWEEN CONTRACTUAL AND TORTIOUS LIABILITY**

This chapter will discuss the contractual liability and tortious liability under U.S. and English Law in three different aspects. It will mainly concentrate on the differences between the contract law and tort law on the aspect of the right to remedies rather than the matter of procedure.

### **A. Requirements of Liability**

Under the adversary system of common law, the plaintiff is mainly permitted and required to present all relevant facts of the case by filing the complaint describing the facts and claiming his right against the defendant.<sup>5</sup> To recover damages arising from either breach of contract or tortious conduct, the plaintiff must illustrate the facts by a preponderance of the evidence to meet all elements of action in order to establish a prima facie case. The requirements of contract liability are different from liability in tort because of the distinction in the underlying rules and principles.

#### **1. Elements of Action under U.S. Law**

In order to ask for the recovery, the plaintiff has to plead an adequacy of asserting claim otherwise the complaint will be dismissed. This means that the complaint must allege enough facts to show that a claim is plausible and not merely conceivable.<sup>6</sup> In addition, merely providing any labels, conclusions, and a formulaic recitation of the elements of a cause of action

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<sup>5</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* 34 (2d ed. 2016).

<sup>6</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

will not suffice.<sup>7</sup> Before considering the rules on concurrence, the elements of contract claim and tort claim should be identified and explained.

### **1.1 Elements of a Prima Facie Breach of Contract Case.**

First, there must exist the enforceable contract if the contracting parties want to rely on the contractual rights to remedies. Contract is defined as a promise or a set of promises that the law will enforce.<sup>8</sup> Bargain for exchange is the primary concern for the court to enforce a promise. When the promisee has given the promisor something in return for exchange, that is considered as the consideration, courts will be willing to enforce such promise that have been made by the promisor.<sup>9</sup> Accordingly, the contractual obligations are imposed by contract that the parties intend to be bound. It is clear that neither the remedies for damages nor the remedy for specific performance is available in case of the breach of an unenforceable contract.<sup>10</sup> A few classes of contracts also require a written memorandum signed by or on behalf of the party to be charged in order to be enforceable.<sup>11</sup> The courts have determined that a failure to satisfy the requirement of written memorandum merely precludes enforcement of the agreement against that party.<sup>12</sup> Nevertheless, in such case courts generally allow the injured party restitution of any benefit that he has conferred on the other party by part performance or otherwise.<sup>13</sup> The

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<sup>7</sup> Phillips v. Cty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008).

<sup>8</sup> RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

<sup>9</sup> E. ALLAN FARNSWORTH ET AL., CONTRACTS 3 (4th ed. 2004); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

<sup>10</sup> RESTATEMENT (SECOND) OF CONTRACTS § 8 (AM. LAW INST. 1981).

<sup>11</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 110, 131 (AM. LAW INST. 1981).

<sup>12</sup> *See* FARNSWORTH ET AL., *supra* note 9, at 398; *see also* Herring v. Volume Merch., Inc., 106 S.E.2d 197, 200 (N.C.1958).

<sup>13</sup> *See* FARNSWORTH ET AL., *Id.* at 402.

Restatement Second of Contracts also added a section stating that “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.” In such case the remedy granted for breach is to be limited as justice requires.<sup>14</sup> Some courts reject this Restatement Second rule while others rely on this rule to add an exception.<sup>15</sup> Notably, when the party acts under a contract that is unenforceable under the Statute of Frauds, the contracting party’s conduct is not considered to be tortious if it occurs without notice of repudiation of such contract.<sup>16</sup> All in all, the most significant limitation on the enforcement of contract is the requirement of consideration.<sup>17</sup>

Second, when a breach of contract occurs, the breaching party is liable for the loss injured by the other party. When performance is due any failure to render it is a breach.<sup>18</sup> For example, the builder who fails in any respect to perform when performance is due has become liable for breach of contract irrespective of his fault. This is true although the defect is insubstantial. Even if it is neither willful nor negligent, and even if the builder is unaware of it, he can be held liable. When the non-breaching party suffered from the breach, he can ask for the relief but he is still obliged to perform his duty otherwise he will be in breach. The injured

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<sup>14</sup> RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. LAW INST. 1981).

<sup>15</sup> See FARNSWORTH ET AL., *supra* note 9, at 408.

<sup>16</sup> RESTATEMENT (SECOND) OF CONTRACTS § 142 (AM. LAW INST. 1981).

<sup>17</sup> See FARNSWORTH ET AL., *supra* note 9, at 47.

<sup>18</sup> See FARNSWORTH ET AL., *Id.* at 535.

party can suspend his performance only if the breach is material.<sup>19</sup> The courts also allow the injured party to terminate the contract only after an appropriate length of time has passed.<sup>20</sup> Understandably, if the contracting party who is bound by contract refuses to perform his obligation, he is responsible for the remedial damages that the other party suffers. In the case when the breach of contract occurs either in the case of nonfeasance or misfeasance<sup>21</sup>, the promisor must pay the compensation to the promisee in order to put the promisee in as good a position as he would have been in had the contract been fully performed. To put the injured party in the position that he expects to be in is the measure generally used today in actions founded on promises that are enforceable.<sup>22</sup>

Third, under the privity doctrine, the plaintiff must be the party to the contract who suffered from the breach in order to assert contractual claim. The persons other than the parties of the contract generally cannot enforce the contract although they receive benefits from the contract. This is because they are not in “privity” with the promisor.<sup>23</sup> However, there are some situations that recognize the right of the intended beneficiary to enforce the contract.<sup>24</sup> This is the reason why the court also encounters the issue of concurrence where the person who suffers from damages arising out of the contracting party’s conduct is a third person to the contract.

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<sup>19</sup> See FARNSWORTH ET AL., *Id.* at 562.

<sup>20</sup> See FARNSWORTH ET AL., *Id.* at 562.

<sup>21</sup> See FARNSWORTH ET AL., *Id.* at 16.

<sup>22</sup> See FARNSWORTH ET AL., *Id.* at 46; see also Richard E. Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163, 166 (1982-1983).

<sup>23</sup> See FARNSWORTH ET AL., *Id.* at 652; see also *Miss. High Sch. Activities Asso. v. Farris*, 501 So. 2d 393 (Miss. 1987).

<sup>24</sup> See FARNSWORTH ET AL., *Id.* at 657-58; see also RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW INST. 1981).

## 1.2 Elements of a Prima Facie Tortious Case

Intentional torts and negligence are two main categories of tort liability that is based on wrongdoer's fault.<sup>25</sup> Modern tort law recognizes the strict liability doctrine in a few cases that impose the tortious liability on the tortfeasor without proof of his fault.<sup>26</sup> While tortious liability is formally based on fault,<sup>27</sup> liability in contract is traditionally strict liability.<sup>28</sup> Tort liability based on fault is imposed in accordance with the corrective justice ideals.<sup>29</sup> This chapter will mainly focus on the tort liability that based on faults, in particular, negligence and the tort of conversion<sup>30</sup> because each of those kinds of tort and breach of contract may occur simultaneously. Moreover, because negligence is an open-ended claim<sup>31</sup> which allows the plaintiff to claim that any defendant's conduct is acted under standard of care, it is plausible for plaintiff to establish parallel negligence action. Thus, claims of negligence have always given rise to complicated concurrent liability issues to be considered.

In order to prevail in tort claim, the plaintiff has to provide the proof of facts that show all required elements of tort liability. Fundamentally, the certain elements of the separated tort

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<sup>25</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 4.

<sup>26</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 5.

<sup>27</sup> *Brown v. Kendall*, 60 Mass. 292 (1850).

<sup>28</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 7.

<sup>29</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 19.

<sup>30</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 107; *see also* DIAMOND, LEVINE & BERNSTEIN, *supra* note 1, at 21. (The tort of conversion is an intentional tort that protects the plaintiff's possessory rights in personal property. The defendant will be held being liable for conversion when he intentionally exercises a substantial control over the tangible personal property, interfering seriously with the plaintiff's rights. So conversion can be committed in many different ways such as dispossession, destruction, and acquiring possession, ownership, or security interests.).

<sup>31</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 188.

claims are different.<sup>32</sup> Additionally, the plaintiff has the burden of proof in tort case.<sup>33</sup> In other words, it is the plaintiff's duty to provide the evidences and persuade the jury to believe the weight of his evidences on all elements for tort he claims. Without any valid defense, the plaintiff will be awarded for damages he claims for.

#### **a. Elements of Negligence Tort**

We can see the rules of tort in negligence case that the plaintiff must prove the duty of care owed by the defendant and the failure of exercising reasonable standard of care under the circumstances.<sup>34</sup> The duty of care may arise or base upon the existence of a contract, a statute, or common law.<sup>35</sup> Furthermore, the ordinary rule of negligence is that negligent liability lies on the defendant only when the plaintiff can prove the legally recognized harms from which he suffers.<sup>36</sup> Claims for negligence always need proof of actual harm.<sup>37</sup> This element of actual harms in negligence action differs from that of some kinds of intentional tort such as battery, assault, fault imprisonment and differs from contract action.<sup>38</sup>

Considering *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 418 A.2d 613 (1980) as an example of legal malpractice claim, in this case the court provided the rule as to the burden of

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<sup>32</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 38.

<sup>33</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 39.

<sup>34</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 42.

<sup>35</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 204.

<sup>36</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 29.

<sup>37</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 189; *see also* *Reardon v. Larkin*, 3 A.3d 376 (Me. 2010).

<sup>38</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 54.

proof in concurrent claim either when the plaintiff sues in contract action or in tort. The rules of law provided in this case are (1) in a legal malpractice action, the plaintiff has a choice between suing the attorney in assumpsit (contract) or in trespass (tort) and (2) the plaintiff is required to prove an essential element of actual loss for legal malpractice, whichever form of action the plaintiff chooses between assumpsit or trespass. The development of the law in legal malpractice case required the element of actual loss because many jurisdictions treat legal malpractice action as sounding in tort.

Apart from the foregoing elements, the proof of causations in fact and in law are also required. Particularly, to consider the scope of liability for negligence (proximate causation), the court usually applies the foreseeability tests by holding that defendant is liable for all kinds of harms the defendant foreseeably risked by defendant's negligent conduct.<sup>39</sup>

Stated briefly, the plaintiff has the burden of proof of facts and persuasion on negligence case. All elements required are (1) the duty owned by defendant to exercise the ordinary standard of reasonable care in order to avoid risky harms to the plaintiff; (2) the defendant's breach of duty of care by acting in unreasonable risky conduct; (3) the actual harms to the plaintiff in fact caused by defendant's conduct (but-for test); (4) the proximate cause of the plaintiff's harms that shows a significant relationship between the defendant's conduct and the harms suffered by the plaintiff, and (5) the existence and the amount of damages.<sup>40</sup>

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<sup>39</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 339.

<sup>40</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 197-98.

## **b. Elements of Tort of Conversion**

Conversion is one kind of intentional tort that may be simultaneously asserted together with breach of contract. It appears that the court at times held that breach of the bailment contract is a conversion.<sup>41</sup> The tort recovery of conversion in bailment case must inevitably consider the effects of the bailment contract when the contract is the foundation of the bailment.<sup>42</sup> For claiming of conversion, the plaintiff must prove the defendant's intent to exercise substantial control over the plaintiff's possession of the tangible property.<sup>43</sup> In many cases, the bailee as the defendant in tort of conversion case has the burden of proof on his innocence in failing to return the bailed goods.<sup>44</sup>

## **2. Elements of Action under English Law**

Similarly, to consider the scope of concurrent liability under English law, we should examine the elements of contract claim and tort claim as well. In doing so, we can explore and identify whether any requirements imposed by English law are different from those of U.S. law.

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<sup>41</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 118; *see also* Fotos v. Firemen's Ins. Co., 533 A.2d 1264 (D.C. 1987); S/M Indus., Inc. v. Hapag-Lloyd A.G., 586 So. 2d 876 (Ala. 1991).

<sup>42</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 119. (Tort law respects the bailor's possession-ownership rights and allows him to recover damages or the goods themselves against a bailee who converts bailed goods by non-return or otherwise. For example, when the bailee does not return the goods, conversion claim can be asserted against the bailee.).

<sup>43</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 107.

<sup>44</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 118; *see also* Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132 (D.C. 1986); Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 213 N.E.2d 873 (N.Y.1965).



## 2.1 Elements of a Prima Facie Breach of Contract Case.

First and foremost, the crucial element is the existence of a contract that is supported by consideration or made by deed. Such contract must be certain and complete. In order to establish the binding contract, the parties must intend to create the legal relations.<sup>45</sup> Fundamentally, the parties to a contract are free to determine the terms of a contract under the theory of freedom of contract.<sup>46</sup> However, some contractual terms will be restricted for the policy reasons.<sup>47</sup> Additionally, the contract must comply with any formal requirement needed for some agreements to be legally binding. But the requirement of the particular forms is merely the exception in limited contracts such as a contract for the sale or other disposition of an interest in land.<sup>48</sup> In essence, the need of consideration is required as a significant element of exchange for the enforceable contract under English law unless such contract is made by deed.<sup>49</sup>

Secondly, if the party fails to perform his obligation under the terms of contract, such party would be liable for breach of contract unless there exists an exculpatory clause.<sup>50</sup> The party may commit the breach without fault unless the express or implied terms of contract required the use of reasonable care when the party performs the contractual obligation, such as the obligations undertaken by a professional in respect of services for a client.<sup>51</sup> Even though the law of contract is the different concept in comparison to the law of tort, it is not true that English

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<sup>45</sup> ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF CONTRACT 44 (2016).

<sup>46</sup> See BURROWS, *Id.* at 48.

<sup>47</sup> See BURROWS, *Id.* at 49.

<sup>48</sup> See BURROWS, *Id.* at 73; see also Law of Property (Miscellaneous Provisions) Act 1989, c. 34, § 2 (Eng.).

<sup>49</sup> See BURROWS, *Id.* at 62-63.

<sup>50</sup> See BURROWS, *Id.* at 107.

<sup>51</sup> See BURROWS, *Id.* at 108.

law deny tort claim that arise in a contractual context.<sup>52</sup> This will be considerably described in chapter five.

Thirdly, under the privity of contract doctrine, only the parties to the contract who can either enforce or be enforced under the contractual relationship.<sup>53</sup> In general, the third party cannot enforce the contract. Nevertheless, there are the exceptions to privity rule, in particular, the exception is set out in the Contracts (Rights of Third Parties) Act 1999.<sup>54</sup> Moreover, the privity rule allows the promisee to enforce the contract although such contract is one for the benefit of a third party. However, the recoverable damages will be nominal.<sup>55</sup> The Contracts (Rights of Third Parties) Act 1999 recognizes a third party's own right to directly enforce the terms of the contract on the condition that 1) the contract expressly provides that he may; or 2) the term of contract purports to confer a benefit on him unless there is the proper interpretation of the contract that the parties did not intend the third party to have that right.<sup>56</sup> Therefore, the third party shall be entitled to any remedies that would have been available to him in an action for breach of contract if he had been a party to the contract.<sup>57</sup> It is noteworthy that the promisee is still entitled to enforce any terms of the contract because the right of the third party is merely additional to the right of the promisee.<sup>58</sup> The "circumventions of the privity" is acceptable under

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<sup>52</sup> See BURROWS, *Id.* at 45.

<sup>53</sup> See BURROWS, *Id.* at 240.

<sup>54</sup> See BURROWS, *Id.* at 241.

<sup>55</sup> See BURROWS, *Id.* at 241-42; *see also* Beswick v. Beswick [1968] AC 58 (HL) (appeal taken from Eng.).

<sup>56</sup> Contracts (Rights of Third Parties) Act 1999, c. 31, § 1(1) (Eng.).

<sup>57</sup> Contracts (Rights of Third Parties) Act 1999, c. 31, § 1(5) (Eng.).

<sup>58</sup> Contracts (Rights of Third Parties) Act 1999, c. 31, § 4 (Eng.).

English law.<sup>59</sup> It has appeared that English common law allows the third party to bring an action for the tort of negligence instead of bringing an action for breach of contract in the case where the party's breach of contract concurrently constitutes the breach of duty of care owed by the contracting party to the third party.<sup>60</sup>

## **2.2 Elements of a Prima Facie Tortious Case**

Apart from the common law on tort, there are the statutory protections. However, all statutes play only the supplementary role.<sup>61</sup> Because tortious duty is imposed by law itself,<sup>62</sup> tortious liability is distinguished from contractual liability.<sup>63</sup> The content of the tortious duty is fixed by law whereas that of the contractual duty is fixed by both the contract itself and the law.<sup>64</sup> However, the intent of the defendant in undertaking the responsibilities for certain conduct may lead to the existence of a negligence duty.<sup>65</sup> Similar to U.S. tort law, tort liability may base upon fault such as intentional tort and negligence and may be the strict liability.<sup>66</sup> Generally speaking, most torts require proof of foreseeable damages as the consequence of

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<sup>59</sup> See BURROWS, *supra* note 45, at 248.

<sup>60</sup> See BURROWS, *Id.* at 248; *see also* White v. Jones [1995] 2 AC 207 (HL) (appeal taken from Eng.).

<sup>61</sup> JOHN FREDERIC CLERK & ANTHONY M. DUGDALE, CLERK & LINDSELL ON TORTS ¶ 1-18 (19th ed. 2006).

<sup>62</sup> PERCY HENRY WINFIELD, WINFIELD AND JOLOWICZ ON TORT 4 (W. V. H. Rogers 11th ed Sweet & Maxwell, 1979).

<sup>63</sup> See WINFIELD, *Id.* at 4.

<sup>64</sup> See WINFIELD, *Id.* at 5.

<sup>65</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 1-03.

<sup>66</sup> See WINFIELD, *supra* note 62, at 43.

defendant's conduct except for trespass to land, to person or to goods which are the forms of intentional torts that are considered to be the torts actionable per se.<sup>67</sup>

### **a. Elements of Negligence Tort**

In case of negligence, the elements of claim are (1) defendant's legal duty owed to the plaintiff to exercise the standard of care; (2) defendant's breach of duty; (3) the causation element that require the connection between the negligent conduct and damages and (4) the foreseeability of consequential damages.<sup>68</sup> As for the third and the forth elements, the plaintiff has to show that plaintiff's damages are caused by the defendant's breach of duty and such kind of damages are not too remote.<sup>69</sup> In other words, the elements of causation including causation in fact and causation in law are also required.<sup>70</sup> Therefore, the plaintiff must prove that the harms suffered would not occurred but for there has been the negligent conduct and such harms has been foreseen by the reasonable man.<sup>71</sup> The plaintiff will lose the negligence case if he fails on the burden of proving the causation.<sup>72</sup> In contrast, in case of conversion and strict liability, the causation requirement has followed from the nature of the tort.<sup>73</sup>

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<sup>67</sup> See WINFIELD, *Id.* at 447; see also CLERK & DUGDALE, *supra* note 61, ¶ 1-44.

<sup>68</sup> See WINFIELD, *supra* note 62, at 66.

<sup>69</sup> See WINFIELD, *Id.* at 109; see also CLERK & DUGDALE, *supra* note 61, ¶ 8-04.

<sup>70</sup> See WINFIELD, *Id.* at 110; see also CLERK & DUGDALE, *Id.* ¶ 2-01; JEB Fasteners Ltd. v. Marks Bloom & Co. [1983] 1 All ER 583 (appeal taken from Eng.).

<sup>71</sup> See WINFIELD, *Id.* at 116-17; see also CLERK & DUGDALE, *Id.* ¶ 2-06; Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] AC 388 (appeal taken from Aus.)

<sup>72</sup> See CLERK & DUGDALE, *Id.* ¶ 2-06.

<sup>73</sup> See CLERK & DUGDALE, *Id.* ¶ 2-08.

Tort claim for recovering any damages arising from unsafe product may be asserted either in negligence or product liability action. If the plaintiff seeks for liability in negligence, he must prove all elements needed specially proving breach of standard of care owes to the plaintiff. However, if the plaintiff as a consumer asserts the product liability action, the defendant's liability will be governed by the Consumer Protection Act 1987. Under Act of 1987, the defendant may be liable to the consumer for damages arising out of the unsafe products although neither the intentional or negligent conduct can be found on the part of defendant.<sup>74</sup> So in this strict liability tort action, the plaintiff do not have to prove defendant's fault but must prove that the injury arises from the defective product to assert product liability action.<sup>75</sup> Notably, the plaintiff can assert tort claim to recover only for damages injured to plaintiff or to other properties not the product itself.<sup>76</sup>

#### **b. Elements of Tort of Conversion**

Conversion is a kind of unlawful appropriation of another's chattel.<sup>77</sup> When the plaintiff can prove that defendant unjustifiably deny the plaintiff's rights or defendant wrongfully assert his right over the goods in a way inconsistent with the plaintiff's rights such as taking, disposing, damaging, or destroying the goods, the defendant may be committed by conversion if the

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<sup>74</sup> See CLERK & DUGDALE, *Id.* ¶ 1-59.

<sup>75</sup> See CLERK & DUGDALE, *Id.* ¶ 1-59; *see also* Consumer Protection Act 1987, c. 43, §§ 2-3 (Eng.).

<sup>76</sup> See CLERK & DUGDALE, *Id.* ¶ 11-02; *see also* Consumer Protection Act 1987, c. 43, § 5(1)(2) (Eng.).

<sup>77</sup> JOHN MURPHY, STREET ON TORTS 258 (12th ed. 2007). (The tort of conversion protects the plaintiff's possession or the right to immediate possession. If the defendant intentionally deals with goods that is seriously inconsistent with the plaintiff's possession or the right to immediate possession, he will be committed by conversion.).

defendant deliberately takes such conduct.<sup>78</sup> So the intent of the defendant to take such wrongful conduct is needed to hold the defendant being liable for conversion. Considering bailment situation,<sup>79</sup> the plaintiff must prove the degree of departure from the contractual terms of the bailment in order to convince that bailee's conduct amounts to conversion.<sup>80</sup> For instance, the carrier commits a conversion when he, in breach of contract with the consignor, delivers the goods to the consignee and it appears that such delivery leads to the destruction of the consignor's lien.<sup>81</sup>

## **B. Scope of Remedies**

The plaintiff may have a higher quantum of damages in tort claim than in contractual claim or vice versa. This depends on some differences on several aspects including the measures of damages, the recoverable damages, and the limitations on damages.

### **1. Scope of Remedies under U.S. Law**

It is generally stated that the recoverable remedies in the case of breach of contract is different from those in tort case because their aims of compensation differ from each other. Such distinction may lead to the need of bringing concurrent tort claim.

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<sup>78</sup> See WINFIELD, *supra* note 62, at 449; *see also* CLERK & DUGDALE, *Id.* ¶¶ 17-07-08.

<sup>79</sup> See CLERK & DUGDALE, *Id.* ¶ 17-07; *see also* Torts (Interference with Goods) Act 1977, c. 32, § 2(2) (Eng.).

<sup>80</sup> See WINFIELD, *supra* note 62, at 452; *see also* MURPHY, *supra* note 77, at 259.

<sup>81</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 17-18; *see also* Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] AC 576 (appeal taken from Sing.).

## **1.1 Damages for Contract Liability**

In general, contract law rejects to mandate the contracting party to perform his duty as he promises.<sup>82</sup> Contract remedies are aimed at providing the relief to promisees who suffer from breach of contract.<sup>83</sup> Therefore, the court generally provides the legal remedy which is a judicial remedy awarding a sum of money rather than giving the equitable remedy that is a judicial order either requiring specific performance or enjoining its nonperformance.<sup>84</sup> This chapter will not look at the equitable remedies that are not usual under common law system in detail but will focus on the pecuniary damages that are the usual form of relief<sup>85</sup> in order to compare with remedies in tort. Generally speaking, when the breach of contract occurs, the court grants the non-breaching party a relief by awarding a sum of money intended to compensate for the harm to his interest. To grant the recovery for types of damages available in contract claim, courts normally apply the appropriate measure of damages. In such cases, the concept of efficient breach may be considered. Additionally, courts will consider whether there are any limitations on damages that have an effect on the quantity of damages asked by the plaintiff.

### **a. The Measures of Damages and Recoverable Remedies**

Before looking at the types of damages available, we should consider the measures of damages that are usually applied in contract claim. The measures of damages causing from breach of contract are in the forms of the protection of promisee's expectation, reliance and

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<sup>82</sup> See FARNSWORTH ET AL., *supra* note 9, at 730.

<sup>83</sup> See FARNSWORTH ET AL., *Id.* at 730.

<sup>84</sup> See FARNSWORTH ET AL., *Id.* at 735.

<sup>85</sup> See FARNSWORTH ET AL., *Id.* at 739.

restitution interests.<sup>86</sup> In order to protect expectation interest, the court tries to put the injured party in as good a position as it would have been in had the contract been performed.<sup>87</sup> This measure of damage will give the injured party the benefits of its bargain that is measured based on the actual value.<sup>88</sup> This kind of measurement requires the element of causation which is similar to the requirement of action in tort. Thus, this element in contract requires the evidences showing that breach of contract is the cause in fact of all loss.<sup>89</sup> In addition, the limitations on damages including the foreseeability, and certainty of loss are also considered.<sup>90</sup> Because the limitations on damages may operate differently in the contract versus the tort context, this may lead to the plaintiff's preferable choice in asserting his claim. Alternatively, the court will protect the promisee's reliance by putting the promisee back in the position in which such party would have been had the contract not been made. This will occur when the promisee has changed position in reliance on the contract by incurring expenses in preparation or in performance.<sup>91</sup> The reliance interest is ordinarily smaller than the expectation interest because the expectation interest includes both loss of profits and the reliance but the reliance interest includes nothing for lost profits.<sup>92</sup> The reliance interest also requires the causation element.<sup>93</sup>

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<sup>86</sup> See FARNSWORTH ET AL., *Id.* at 46.

<sup>87</sup> See FARNSWORTH ET AL., *Id.* at 730.

<sup>88</sup> See FARNSWORTH ET AL., *Id.* at 730; see also L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L. J. 52 (1936-1937).

<sup>89</sup> See FARNSWORTH ET AL., *Id.* at 731; see also *Wright v. St. Mary's Med. Ctr., Inc.*, 59 F. Supp. 2d 794 (S.D. Ind. 1999).

<sup>90</sup> See FARNSWORTH ET AL., *Id.* at 732; see also *Wright*, 59 F. Supp. 2d 794.

<sup>91</sup> See FARNSWORTH ET AL., *Id.* at 732; see also Fuller & Perdue, *supra* note 88, at 52.

<sup>92</sup> See FARNSWORTH ET AL., *Id.* at 733.

<sup>93</sup> See FARNSWORTH ET AL., *Id.* at 733.



The court sometimes recognized the restitution interest to the injured party in order to prevent unjust enrichment but not to enforce the promise.<sup>94</sup> This damage category tries to put the breaching party back in the position in which such party would have been had the contract not been made.<sup>95</sup> In other words, the injured party can recover all money or services that the breaching party has received before breaching the contract.<sup>96</sup> The restitution interest is smaller than both expectation interest and reliance interest.<sup>97</sup>

As for the main measure of damage in protecting expectation interest, either in the case of total breach of contract or partial breach, the injured party may generally claim for loss of expectation interest including 1) loss in value; 2) other loss such as incidental and consequential damages.

A contract claim and a tort claim have a difference in the rights to type of damages. For instance, the right to pure economic loss is allowed in a typical breach of contract while damages for pain and suffering or mental distress are recoverable in tort. Punitive damages are available in tort but generally not in contract. Apart from considering the measures of damages, we will also consider some types of damages that are mainly available in tort claim but such types are either restricted or refused in contract claim. These types of damages are damages for mental or emotional distress, and punitive damages. This can show that the plaintiff may choose to sue in tort rather than in contract in order to recover such types of damages. In addition, the

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<sup>94</sup> See FARNSWORTH ET AL., *Id.* at 733.

<sup>95</sup> See FARNSWORTH ET AL., *Id.* at 733.

<sup>96</sup> See FARNSWORTH ET AL., *Id.* at 733.

<sup>97</sup> See FARNSWORTH ET AL., *Id.* at 734.

rights to pure economic loss, that is generally available in contract claim, will be explored as the concept of limiting the imposition of tort liability to the party.

Damages that result from mental distress are sometimes recoverable. Contract law does not allow the recovery of emotional disturbance unless 1) the breach causes bodily harm or 2) even without bodily harm, “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”<sup>98</sup> Some courts also allow the recovery for mental distress in the case where the breach of contract amounts to a tort.<sup>99</sup>

The right to punitive damage under contract law is severely restricted. In general, courts will not award punitive damages intended to punish the breaching party because the main goal of contract remedy is to compensate the injured party for his expectation.<sup>100</sup> Punitive damages may, however, be awarded in tort actions, and a number of courts have awarded them for a breach of contract that is tortious in some respects.<sup>101</sup> Some courts impose punitive damages when the breach of contract is accompanied by an independent tort, at least if the conduct is sufficiently outrageous to justify such damages.<sup>102</sup> However, when plaintiff’s right is limited to

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<sup>98</sup> See FARNSWORTH ET AL., *Id.* at 810; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

<sup>99</sup> See FARNSWORTH ET AL., *Id.* at 810; *see also* Chung v. Kaonohi Ctr. Co., 618 P.2d 283 (Haw. 1980).

<sup>100</sup> See FARNSWORTH ET AL., *Id.* at 760.

<sup>101</sup> See FARNSWORTH ET AL., *Id.* at 761; *see also* Cheney v. Palos Verdes Inv. Corp., 665 P.2d 661 (Idaho 1983); Kuhn v. Coldwell Banker Landmark, Inc., 245 P.3d 992 (Idaho 2010).

<sup>102</sup> See FARNSWORTH ET AL., *Id.* at 761; *see also* Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 379 (5th Cir. 1980).

damages available in contract action because of the economic loss rule, punitive damage is not recoverable because plaintiff cannot recover tort damages.<sup>103</sup>

Notably, some court held that the characterization of the cause of action found in either breach of contract (breach of warranty) or negligence is not determined by the question as to whether the types of remedy sought are one that is available for contract or tort.<sup>104</sup> Other courts held that the types of the remedy sought influences the court in determining the cause of action and the choice of applicable limitation period.<sup>105</sup>

### **b. The Concept of Efficient Breach**

U.S. contract law recognizes an efficient breach. That is to say that nonperformance is economically efficient when the benefits gained by the breaching party are greater than the value of the loss to the other party.<sup>106</sup> Therefore, under economic analysis, nonperformance and its consequent reallocation of resources is socially desirable.<sup>107</sup> It is important to consider the concept of efficient breach in U.S. contract law. This is because this concept may have an influence on the scope of remedies granting to the plaintiff especially when the courts consider whether the punitive damages should be granted to the plaintiff. Generally, punitive damages

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<sup>103</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 1080; *see also* Richard Swaebe v. Sears World Trade, 639 So. 2d 1120 (Fla. Dist. Ct. App. 1994); Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233 (Wis. 2004).

<sup>104</sup> CALVIN W. CORMAN, LIMITATION OF ACTIONS 199 (1991); *see also* W. Elec. Co. v. Brenner, 41 N.Y.2d 291 (1977).

<sup>105</sup> See CORMAN, *Id.* at 199; *see also* Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389 (1977); Dantagnan v. I. L. A. Local 1418, 496 F.2d 400 (5th Cir. 1974).

<sup>106</sup> See FARNSWORTH ET AL., *supra* note 9, at 736.

<sup>107</sup> See FARNSWORTH ET AL., *Id.* at 736.

would not be awarded in breach of contract especially in efficient breach.<sup>108</sup> In addition, it is possible that the doctrine of efficient breach may be taken into account in limiting the imposition of tort liability to the breaching party, in particular, in commercial transaction.

### **c. The Limitations on Damages**

When the plaintiff claims for damages suffered from the defendant's breach of contract, the court will consider what are the recoverable damages in contract case. Moreover, plaintiff's amount of damages available may be reduced because the recoverable damages are also subjected to the limitations such as those of avoidability, foreseeability and certainty.<sup>109</sup> Normally, the limitations on damages are taken into account in the process of considering the amount of recoverable damages. Thus, the explanation of the different scope of remedies between contract claim and tort claim should be focused on the limitations on damages as well. Particularly, when it appears that such limitations may operate differently in the contract claim and tort claim. There are three limitations on the recovery of damages for breach of contract including avoidability, foreseeability, and the requirement of certainty.<sup>110</sup> All three limitations result in the reduction in the amount of damages recoverable under the general concept that protects the promisee's expectation.<sup>111</sup> Under the avoidability limitation, the injured party is precluded from recovering damages for any loss that he could take appropriate steps to avoid such loss.<sup>112</sup> The party in breach generally has the burden of prove that the injured party does

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<sup>108</sup> See FARNSWORTH ET AL., *Id.* at 737.

<sup>109</sup> See FARNSWORTH ET AL., *Id.* at 764-66.

<sup>110</sup> See FARNSWORTH ET AL., *Id.* at 759-60.

<sup>111</sup> See FARNSWORTH ET AL., *Id.* at 760.

<sup>112</sup> See FARNSWORTH ET AL., *Id.* at 779.

not take appropriate steps to mitigate its loss.<sup>113</sup> Under the limitation of foreseeability, if the party in breach, at the time of making the contract, did not have reason to foresee a probable loss that does not arise naturally from the breach – that is the consequential damage, such party is not liable for such damages.<sup>114</sup> This reasonable contemplation requirement for the recovery of consequential damages restricts the scope of remedies that are allowed for breach of contract. The restriction of foreseeability is severer than that for the recovery of damages in tort claim which is upon the proximate cause test.<sup>115</sup> Under uncertainty limitation, damages for breach of contract must be clearly proved with certainty and such damages cannot be merely left to speculation.<sup>116</sup> Nevertheless, any breach gives the injured party a claim for damages. This means that even though the injured party suffers from no loss or the amount of loss that is not prove with sufficient certainty, such party can recover at least nominal damages.<sup>117</sup> In addition to this, the reasonable certainty is recognized in the recent decades.<sup>118</sup>

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<sup>113</sup> See FARNSWORTH ET AL., *Id.* at 780.

<sup>114</sup> See FARNSWORTH ET AL., *Id.* at 792-93; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 351 (AM. LAW INST. 1981).

<sup>115</sup> See FARNSWORTH ET AL., *Id.* at 794; *see also* RESTATEMENT (SECOND) OF TORTS § 435 (AM. LAW INST. 1979).

<sup>116</sup> See FARNSWORTH ET AL., *Id.* at 800; *see also* Griffin v. Colver, 16 N.Y. 489 (1858).

<sup>117</sup> See FARNSWORTH ET AL., *Id.* at 757; *see also* Chung v. Kaonohi Ctr. Co., 618 P.2d 283 (Haw. 1980).

<sup>118</sup> See FARNSWORTH ET AL., *Id.* at 800; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981).

Notably, the requirement of certainty for recover damages in breach of contract is still more strictly applied than that for recover damages in tort claim.<sup>119</sup>

#### **d. The Enforceability of Liquidated Remedy**

It is necessary to consider the validity and enforceability of the provision of liquidated damages. This is because the amount of recoverable damages in contract claim may be limited by parties' agreement on the relief for breach of contract. Under U.S. contract law, the court gives the parties to the contract the power to agree about the relief for breach of contract.<sup>120</sup> However, their power to bargain over their right to remedies is limited.<sup>121</sup> On one hand, if the parties have agreed that so large amount of damages are payable under their agreement, such agreement being categorized as "penalty" is denied under the law of remedies for breach of contract and the injured party is remitted to the conventional damage remedy.<sup>122</sup> On the other hand, if the agreement of the remedial right is enforceable as liquidated damages, damages to the sum given are limited and the parties are bound by such agreement.<sup>123</sup> It is acceptable that if the amount of damages is , at the time of contracting, reasonably stipulated in the light of the

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<sup>119</sup> See FARNSWORTH ET AL., *Id.* at 800; *see also* RESTATEMENT (SECOND) OF TORTS § 912 (AM. LAW INST. 1979).

<sup>120</sup> See FARNSWORTH ET AL., *Id.* at 810.

<sup>121</sup> See FARNSWORTH ET AL., *Id.* at 811.

<sup>122</sup> See FARNSWORTH ET AL., *Id.* at 811-13.

<sup>123</sup> See FARNSWORTH ET AL., *Id.* at 811-13.

anticipated or actual loss caused by the breach and of the difficulties of proving loss, such sum of damages is characterized as liquidated damages and enforceable.<sup>124</sup>

Recently, the rule under U.S. system has not been clearly seen whether or not the provision of the liquidated damages excludes or limits the concurrent tortious liability.

## **1.2 Damages for Tortious Liability**

### **a. The Measures of Damages and Recoverable Remedies**

As to the measures of damages, tort law has intended to compensate the injured person who suffers from legally recognized harms by awarding damages to the plaintiff against the defendant who is the wrongdoer.<sup>125</sup> So the plaintiff's primary goal is to be awarded the monetary damages as a compensation of harms suffered.<sup>126</sup> In comparison to the type of damages recoverable in contract claim, the court is highly inclined to allow the damages for emotional distress and punitive damages in tort claim. Damages for emotional distress are broadly recoverable when plaintiff establishes the right to recover for emotional harm as one item of damages under ordinary negligence action that also caused other physical injuries.<sup>127</sup> A punitive damage is also allowed in some circumstances in order to deter further wrongful act,<sup>128</sup> for instance it is traditionally allowed when the defendant's conduct is outrageous.<sup>129</sup>

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<sup>124</sup> See FARNSWORTH ET AL., *Id.* at 814; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981).

<sup>125</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 4.

<sup>126</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 4.

<sup>127</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 699-700.

<sup>128</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 4.

Claim for damages for pain, suffering, and emotional distress as well as punitive damages<sup>130</sup> are allowed as the open-ended without any measurement. While the plaintiff is likely to be awarded at large sums of money,<sup>131</sup> damages caps are imposed in some states.<sup>132</sup>

As to the recovery for economic loss, it is likely that the plaintiff's rights to such loss are broadly protected in contract claim. The right to economic loss is harshly restricted in tort action. The economic loss is likely limited under the rule of negligence unless economic harm is an item of damages in negligence suit.<sup>133</sup> In terms of pure economic loss, the court is likely to be concerned to preserve the role of contract and exclude the tort claim for pure economic loss.<sup>134</sup> Claim of negligence for pure economic loss is actionable in the case where the court held that there exists a special contractual relationship between parties such as the relationship between the lawyer and client so that defendant owned the duty of care to the plaintiff.<sup>135</sup> This make the legal malpractice ordinarily treated as an economic tort that causes financial harm without injury to person or to property.<sup>136</sup>

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<sup>129</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 862; *see also* RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

<sup>130</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 861.

<sup>131</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 852.

<sup>132</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 873-74.

<sup>133</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 933.

<sup>134</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 931, 933.

<sup>135</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 933, 1061; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM §§ 1, 4-6 (AM. LAW INST., Tentative Draft No. 1, 2012).

<sup>136</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1163; *see also* *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 87 A.3d 534 (Conn. 2014).



In conclusion, the scope of damages awards in negligence case mainly comprise of 1) physical harm to person including pecuniary losses such as lost wages or lost earnings, medical expenses, pain and suffering as well as damages for emotional distress and 2) physical damages to tangible property.<sup>137</sup> Significantly, all preceding damages would be awarded only if these damages meet the requirement of foreseeability.<sup>138</sup>

Turning to consider the recoverable remedies in the tort of conversion, subject to the valid limitation on liability the parties have agreed, the plaintiff can recover for monetary damages at the market value of the goods at the time and place of conversion except for the case that the value of converted goods fluctuates.<sup>139</sup> Additionally, damages for loss of use, consequential damages<sup>140</sup>, and punitive damages are allowed in conversion action. Contrary to negligence case, when plaintiff cannot prove the actual damage in conversion case, the sums of nominal damages are also allowed.<sup>141</sup>

#### **b. The Limitations on Damages**

As being stated before, the limitations on damages have an effect on the amount of damages. The relevant limitations on damages in tort claim are thus worthy of being considered

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<sup>137</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 189, 857.

<sup>138</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 190.

<sup>139</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 125; *see also* Trs. of the Univ. of the D.C. v. Vossoughi, 963 A.2d 1162 (D.C. 2009); C.A.R. Transp. Brokerage Co. v. Seay, 255 S.W.3d 445 (Ark.2007).

<sup>140</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 126; *see also* Newbury v. Virgin, 802 A.2d 413 (Me. 2002); Potter v. Wash. State Patrol, 196 P.3d 691 (Wash. 2008).

<sup>141</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 612; *see also* MacGuire v. Elometa Corp., 189 A.D.2d 708, 592 N.Y.S.2d 730 (App. Div. 1993).

in order to illustrate the different scope of remedies that has an influence on the plaintiff's choice of tort claim rather than contract claim or vice versa. The contributory negligence, plaintiff's assumption of risk, and the mitigation of damages rule are concerned as the limitations. In negligence case, in most states the defendant may raise the affirmative defense including either the plaintiff's fault (comparative negligence) or plaintiff's assumption of risk to reduce damage. Similarly, there is the mitigation of damages rule under tort law.<sup>142</sup> This rule requires that the plaintiff should take the reasonable care or expenditure to avoid damages suffered. The recovery for damages that could be avoided will be denied under this rule.<sup>143</sup> And plaintiff can recover for any reasonable expenditure he incurs in mitigation of damages.<sup>144</sup>

## **2. Scope of Remedies under English Law**

Similar to U.S. law, there exists a distinction on remedies in some respects between contract claim and tort claim. The profound study on this distinction will lead to the understanding on concurrent claim under English law which is discussed in chapter five.

### **2.1 Damages for Contract Liability**

Under the general law of remedies for breach of contract, when the breach of contract occurs by one party, the other party has the right to terminate the contract in order to end the contractual relationship.<sup>145</sup> When the party chooses to terminate the contract, such party can be

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<sup>142</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 403.

<sup>143</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 403; *see also* Preston v. Keith, 584 A.2d 439 (Conn. 1991); Bryant v. Calantone, 286 N.J. Super. 362 (1996).

<sup>144</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 403; *see also* RESTATEMENT (SECOND) OF TORTS § 919 (AM. LAW INST. 1979); In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 4 A.3d 492 (Me. 2010).

<sup>145</sup> See BURROWS, *supra* note 45, at 111.

awarded damages for breach as well.<sup>146</sup> Where one party commits a breach of contract, the injured party has a right to compensatory damages for the loss caused by the breach.<sup>147</sup>

#### **a. The Measures of Damages and Recoverable Remedies**

The compensatory damages are normally in the form of a monetary damages and generally provided equivalent to the loss arising from the breach.<sup>148</sup> Specific performance is allowed as an equitable remedy.<sup>149</sup> Specific performance is unusual for a common law country so it is thought of as a secondary remedy to compensatory damages under English law.<sup>150</sup> Considering the measures of damages, contract law on remedies aims at putting the injured party into as good a position as when the contract had been performed to protect the injured party's expectation interest.<sup>151</sup> Alternatively, the injured party can seek for the reliance damages instead of the expectation interest to reach the overall aim of compensatory damages.<sup>152</sup>

In terms of recoverable remedies under English contract law, compensatory damages are generally concerned to compensate pecuniary loss while the non-pecuniary loss such as “mental

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<sup>146</sup> See BURROWS, *Id.* at 111.

<sup>147</sup> See BURROWS, *Id.* at 120.

<sup>148</sup> See BURROWS, *Id.* at 120.

<sup>149</sup> See BURROWS, *Id.* at 149.

<sup>150</sup> See BURROWS, *Id.* at 150.

<sup>151</sup> ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 33 (3th ed. 2004).

<sup>152</sup> See BURROWS, *supra* note 45, at 123.

distress” is not recoverable.<sup>153</sup> However, personal injury such as damages for pain and suffering can be awarded even though the plaintiff almost always seeks for such damages in tort.<sup>154</sup>

The mental distress for breach of contract claim has been allowed by the court in some exceptional cases where the mental satisfaction is an important object of the contract<sup>155</sup> It appears that the court applies the approach that considers the mental satisfaction being as the important object of the contract to allow the mental distress in the case where the claim was brought against the defendant both in contract and tortious negligence.<sup>156</sup>

The recovery for economic loss is normally based on contract claim. The remoteness test is also required and based on the kind of loss that is in the defendant’s reasonable contemplation. It is held that the contemplation of economic loss in contract claim required a greater degree of probability than the foresight test in tort.<sup>157</sup>

Punitive damages cannot be awarded for breach of contract under English contract law.<sup>158</sup> This is contrary to tort law that allows punitive damages where the facts meet the requirements

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<sup>153</sup> See BURROWS, *Id.* at 127.

<sup>154</sup> See BURROWS, *Id.* at 127.

<sup>155</sup> See BURROWS, *supra* note 151, at 253; *see also* Watts v. Morrow [1991] 1 WLR 1421 (appeal taken from Eng.); Ruxley Electronics and Construction Ltd. v. Forsyth [1996] AC 344 (HL) (appeal taken from Eng.); Farley v. Skinner [2002] 2 AC 732 (HL) (appeal taken from Eng.).

<sup>156</sup> See BURROWS, *Id.* at 327; *see also* Hamilton-Jones v. David & Snape [2004] 1 WLR 924 (Ch D).

<sup>157</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 2-144; *see also* C Czarnikow Ltd. v. Koufos (The Heron II) [1969] 1 AC 350 (HL) (appeal taken from Eng.).

<sup>158</sup> See BURROWS, *supra* note 45, at 136; *see also* Perera v. Vandiyar [1953] 1 WLR 672 (CA) (appeal taken from Eng.).

imposed in *Rookes v. Barnard* [1964] AC 1129 (HL). For example, the punitive damages could be awarded in case where the defendant has calculated to make a profit for himself which greatly exceed the compensation payable to the plaintiff.<sup>159</sup>

## **b. The Limitations on Damages**

There are also the limits on compensatory damages.<sup>160</sup> The defendant has the burden of proof on the limitations of compensatory damages.<sup>161</sup> The first one of limits is the remoteness restriction.<sup>162</sup> If, at the time the contract was made, the defendant has not been reasonably contemplated whatever type of loss as a serious possibility, that kind of loss is too remote.<sup>163</sup> Second, the defendant is not responsible for the loss where an intervening cause either a natural event, a third party's conduct or the plaintiff's conduct breaks the chain of causation.<sup>164</sup> This means that the intervening cause is much more responsible for loss than the defendant's breach.<sup>165</sup> Third, the plaintiff is required to take reasonable steps to mitigate damages.<sup>166</sup> If the plaintiff fails to take the reasonable steps to minimize the loss, he cannot recover such damages.<sup>167</sup> Forth, the law on contributory negligence is, in practice, applied as the limitation of damages for breach of contract as a matter of statutory interpretation of the Law Reform

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<sup>159</sup> See BURROWS, *Id.* at 136.

<sup>160</sup> See BURROWS, *Id.* at 128.

<sup>161</sup> See BURROWS, *Id.* at 129.

<sup>162</sup> See BURROWS, *Id.* at 129.

<sup>163</sup> See BURROWS, *Id.* at 129.

<sup>164</sup> See BURROWS, *Id.* at 131.

<sup>165</sup> See BURROWS, *Id.* at 131.

<sup>166</sup> See BURROWS, *Id.* at 131.

<sup>167</sup> See BURROWS, *Id.* at 131.

(Contributory Negligence) Act 1945 which raised by courts.<sup>168</sup> In addition, contributory negligence is applicable to the case where the breach of contractual duty of care also simultaneously meet the requirement of the independent tort of negligence.<sup>169</sup> In particular, in the case of concurrent liability in contract and tort, it is submitted that the plaintiff should not be able to avoid the contributory rule by choosing to assert contract claim.<sup>170</sup> As a result, damages will be reduced, not eliminated, “to such extent as the court thinks just and equitable having regard to the plaintiff’s share in the responsibility for the damage.”<sup>171</sup>

### **c. The Enforceability of Liquidated Remedy**

Similar to the U.S. contract law the validity and enforceability of the provision of liquidated damages may affect the amount of recoverable damages in contract claim. It thus important to consider whether the agreement on the sum of money being the damages payable is valid and enforceable or not. Under English contract law, parties are allowed to include a term in the contract in order to stipulate for the sum of money to be the damages payable in the case of breach.<sup>172</sup> Such term is enforceable as the “liquidated damages” if it is not the penalty. The stipulated sum of damages is not a penalty if it is, in the time of contracting, estimated to protect

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<sup>168</sup> See BURROWS, *Id.* at 132; see also Law Reform (Contributory Negligence) Act 1945, 8 & 9 Geo. 6 c. 28, §§ 1,4 (Eng.); Barclays Bank Plc v. Fairclough Building Ltd. (No.2) [1995] PIQR P152 (appeal taken from Eng.).

<sup>169</sup> See BURROWS, *Id.* at 132; see also CLERK & DUGDALE, *supra* note 61, ¶ 3-48; Forsikringsaktieselskapet Vesta v. Butcher [1989] AC 852 (HL) (appeal taken from Eng.); Barclays Bank Plc v. Fairclough Building Ltd. (No.2) [1995] PIQR P152 (appeal taken from Eng.); UCB Bank Plc v. Hephew Winstanley & Pugh [1999] WL 478074 (appeal taken from Eng.).

<sup>170</sup> See CLERK & DUGDALE, *Id.* ¶ 3-48.

<sup>171</sup> Law Reform (Contributory Negligence) Act 1945, 8 & 9 Geo. 6 c. 28, § 1(1) (Eng.).

<sup>172</sup> See BURROWS, *supra* note 45, at 137.

a legitimate interest of the plaintiff and it does not exceed all proportion to such interest.<sup>173</sup> It is noteworthy that where the breaching party is a consumer, the stipulated term may be invalid if it is considered to be unfair under the Consumer Rights Act 2015.<sup>174</sup>

## **2.2 Damages for Tortious Liability**

### **a. The Measures of Damages and Recoverable Remedies**

Tort law aims at compensation so that the rules on damage try to “put the plaintiff in the position he would have been in had the tort not been committed.”<sup>175</sup> Hence, the remedy in tort rule generally provides an award of unliquidated damages.<sup>176</sup> While tort law protects the wide range of interest against the wrongfully conduct, the compensatory damage is particularly focused for tort negligence.<sup>177</sup> Significantly, personal interests such as the rights to bodily integrity, personal liberty, physical security from injury, psychiatric harm and distress are mainly protected by either intentional tort, negligence and strict liability in many cases.<sup>178</sup> Property interest such as the rights to possession, physical damage to property are also protected by both intentional tort, such as conversion, and negligence.<sup>179</sup>

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<sup>173</sup> See BURROWS, *Id.* at 137; *see also* Cavendish Square Holdings BV v. Makdessi [2016] AC 1172 (appeal taken from Eng.).

<sup>174</sup> See BURROWS, *Id.* at 138.

<sup>175</sup> See WINFIELD, *supra* note 62, at 5; *see also* See BURROWS, *supra* note 151, at 33.

<sup>176</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 1-04.

<sup>177</sup> See CLERK & DUGDALE, *Id.* ¶ 1-10.

<sup>178</sup> See CLERK & DUGDALE, *Id.* ¶¶ 1-21-25, 14-17.

<sup>179</sup> See CLERK & DUGDALE, *Id.* ¶¶ 1-32-33.

Claims for personal injury are mostly available in tortious action but they can also be recoverable in claims for breach of contract.<sup>180</sup> Taking damages in medical negligence cases as an example, in general, the court applies the measure of damage in claim for personal injury to the medical cases. Damages for mental distress is also revocable in some circumstances.<sup>181</sup> Moreover, there is the view that damages for mental distress should be awarded both in tort claim and breach of contract claim although courts have traditionally been reluctant in awarding mental distress for breach of contract.<sup>182</sup>

According to English law, it is generally clear that it is insufficient for plaintiff to recover damages if he suffers only economic loss arising from defendant's negligent conduct.<sup>183</sup> However, pure economic loss resulting from negligent conduct is also protected by tort law in some situations. The recovery of damages for pure economic loss in tort claim has restricted and then has developed through the tort of negligent misrepresentation case that allowing the recovery of pure economic loss.<sup>184</sup> In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL), court allowed the recovery for wasted expenditure in negligent misrepresentation action because the special relationship between the plaintiff and defendant created the

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<sup>180</sup> See BURROWS, *supra* note 151, at 269, 325; see also *Giambrone & Ors v. Sunworld Holidays Ltd.* [2004] EWCA Civ 158 (appeal taken from Eng.).

<sup>181</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 10-95.

<sup>182</sup> See BURROWS, *supra* note 151, at 324; see also *Addis v. Gramophone Co. Ltd.* [1909] AC 488 (HL) (appeal taken from Eng.); *Groom v. Crocker* [1939] 1 KB 194 (CA) (appeal taken from Eng.).

<sup>183</sup> See WINFIELD, *supra* note 62, at 82; see also Margaret Rutherford, *Economic Loss - Back to Basic Principles*, 55 ARBITRATION 79 (1989); Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 L.Q.R. 249 (1991).

<sup>184</sup> See BURROWS, *supra* note 151, at 253; see also *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL) (appeal taken from Eng.).



defendant's duty to safeguard the plaintiff's economic interest.<sup>185</sup> And after *Hedley Byrne's* case, in some limited situations, there are the recognitions that the plaintiff can recover for pure economic loss arising from the acts or omissions under the tort of negligence.<sup>186</sup> For instance, it is common that where the solicitor negligently provides services to the client, the client can recover for the loss of chance of litigating or recovering compensation.<sup>187</sup> So, the requirement of special relationship is needed to award pure economic loss in tort claim.<sup>188</sup> However, when the defendant asserted the tort claim for economic loss arising from the defendant's breach of contract, it is arguable that the court should apply the narrower contractual test of remoteness in order to grant the right to such damages.<sup>189</sup>

Considering the recoverable remedies for conversion case, the Torts (Interference with Goods) Act 1977 Section 3 provides that the plaintiff can ask for either form of relief as followed:

“(a) an order for delivery of the goods, and for payment of any consequential damages, or

(b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or

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<sup>185</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 8-48; *see also* *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL) (appeal taken from Eng.).

<sup>186</sup> See BURROWS, *supra* note 151, at 253.

<sup>187</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 2-50.

<sup>188</sup> See CLERK & DUGDALE, *Id.* ¶¶ 8-86-87; *see also* *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384; *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) (appeal taken from Eng.).

<sup>189</sup> See CLERK & DUGDALE, *Id.* ¶ 2-145.

(c) damages.”

Punitive damages are restrictively awarded in only two classes of case to punish the defendant and to deter him from the same conduct in the future.<sup>190</sup> The first is that the punitive damages are recoverable where there is the “oppressive, arbitrary or unconstitutional action by servants of the Government.”<sup>191</sup> Secondly, in the case “where the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff,” the court will allow the punitive damages.<sup>192</sup>

### **b. The Limitations on Damages**

The recovery for damages in tort claim is under some limitations such as the test of remoteness, duty of mitigation and contributory negligence. First, the test of remoteness as a causation requirement is considered to limit damages for which the defendant is responsible.<sup>193</sup> If damages would not normally be anticipated or such damages occurred in an unusual way, that type of damage is considered to remote and then the defendant is not held responsible. As can be seen, the rules on remoteness are traditionally more advantageous to the plaintiffs in tort than in contract.<sup>194</sup> Second, it is excepted that the amount of recoverable damages is also governed by the rule of mitigation of damage that requires the plaintiff to mitigate his loss by taking

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<sup>190</sup> See WINFIELD, *supra* note 62, at 593.

<sup>191</sup> See WINFIELD, *Id.* at 593; *see also* Rookes v. Barnard [1964] AC 1129 (HL) (appeal taken from Eng.).

<sup>192</sup> See WINFIELD, *Id.* at 594; *see also* Rookes v. Barnard [1964] AC 1129 (HL) (appeal taken from Eng.).

<sup>193</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 2-107.

<sup>194</sup> See BURROWS, *supra* note 151, at 7.

reasonable steps on his part.<sup>195</sup> Third, the recoverable damage may be reduced under the rule of contributory negligence. The Law Reform (Contributory Negligence) Act 1945 Section 1(1) provides that the fault of the person suffering damage will lead to the reduction of damages recoverable. The court will consider the extent of the plaintiff's share in the responsibility for damages to make the just and equitable decision.<sup>196</sup>

### **C. Limitation of Action**

Both contract claim and tort claim are subject to their own rule of limitation period. It appears in most concurrent cases that the plaintiff prefer tort claim to contract claim because of the longer limitation period. It is thus important to explore the different rules of limitation period that are applicable to either tort claim or contract claim in order to find the answer to the question as to whether the courts allow the plaintiff to rely on tort claim because of the longer limitation period.

When the plaintiff fails to bring lawsuit within the period of time required, his claim will generally be barred by the statute of limitations and dismissed. The court enforces the limitation period that is agreed by the parties although it is shorter than the period that specified by the applicable statute of limitations if such period is reasonable.<sup>197</sup> However, the agreed period that

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<sup>195</sup> See WINFIELD, *supra* note 62, at 599.

<sup>196</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 3-33; *see also* Law Reform (Contributory Negligence) Act 1945, 8 & 9 Geo. 6 c. 28, § 1(1).

<sup>197</sup> See CORMAN, *supra* note 104, at 178-79; *see also* Wesselman v. Travelers Indem. Co., 345 A.2d 423 (Del. 1975).

is longer than the limitation period legislatively fixed is held void because this is contrary to public policy.<sup>198</sup>

### **1. Statute of Limitations under U.S. Law**

In general, the breach of contract cause of action is likely to have a different limitation period in comparison to the tort claim.<sup>199</sup> Characterizing cause of action between contract and tort will affect the determination of the limitation period. There are different either federal and state statutes of limitations which have limited different periods of time both in contract and tort cause of actions. In *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982), the court recognized that where the plaintiff has more than one legal remedy (remedy both in contract and tort), he may choose to seek the remedy that is more beneficial as to the view of the applicable limitation period.<sup>200</sup> So plaintiff's pleading and the form of action may dictate the applicable limitation period.<sup>201</sup> As it appeared in the legal malpractice actions, some courts have applied the tort statute of limitations to the legal malpractice action when the plaintiff's complaint sounds in tort although the claim could be brought in contract.<sup>202</sup>

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<sup>198</sup> See CORMAN, *Id.* at 180; see also Sally A. Smith, Annotation, *Validity of Contractual Provision Establishing Period of Limitations Longer than that Provided by State Statute of Limitations*, 84 A.L.R.3d 1172 (1978).

<sup>199</sup> Neil Sobol, *Determining Limitation Periods for Actions Arising under Federal Statutes*, 41 SOUTH WESTERN L.J. 895, 905 (1987-1988).

<sup>200</sup> See CORMAN, *supra* note 104, at 142; see also *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982).

<sup>201</sup> See CORMAN, *Id.* at 200; see also *Fed. Ins. Co. v. Ins. Co. of N. Am.*, 262 La. 509, 263 So. 2d 871 (1972).

<sup>202</sup> See CORMAN, *Id.* at 351; see also *Peters v. Simmons*, 552 P.2d 1053 (Wash. 1976); *Goodstein v. Weinberg*, 245 S.E.2d 140 (Va. 1978).

Normally, the significant issue of limitation period for the court to be determined is the issue of the starting date of the limitation period. This is because the statutes frequently state that the period begins to run when the plaintiff's cause of action accrues. To determine at what point of accrual to begin with is interpreted by the court, in particular, in the case where the wrongdoing and the resulting injury are not simultaneous.<sup>203</sup> In doing so, the court will consider the different rules amongst "(1) the occurrence of the legal violation ( the occurrence rule), (2) the resulting damage (the damage rule), and (3) the awareness of the resulting harm and its causation (the discovery rule)."<sup>204</sup> Especially, if the discovery rule is applied to the action, the shorter limitation period may not be barred. Conversely, the longer period may be time barred because of the earlier date of the commencement that is applied by the occurrence rule.

### **1.1 The Statute of Limitations for a Breach of Contract Claim**

Many jurisdictions have the written-contract limitations statutes that usually run four to six years except for a few states that provide the much longer period.<sup>205</sup> For instance, the Uniform Commercial Code § 2-725 provides that the written contract for sale of goods runs for four years after the cause of action accrues. So when the seller is in breach of express or implied warranty under contract for sale of goods, the UCC § 2-725 is the applicable limitation period in particular to the economic loss arising from the defective product.<sup>206</sup> Some courts reason that UCC 2-725 is properly applied to the breach of implied warranty because such breach is created

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<sup>203</sup> See CORMAN, *Id.* at 370.

<sup>204</sup> See CORMAN, *Id.* at 370.

<sup>205</sup> See CORMAN, *Id.* at 303.

<sup>206</sup> See CORMAN, *Id.* at 309.

by Article 2 of Uniform Commercial Code.<sup>207</sup> On the contrary, other courts focus on the strict tort liability of the personal injury defective product litigation and select to apply the personal injury or tort statute of limitations.<sup>208</sup> The personal injury or tort statute of limitations is also apply in an action brought against the constructor when the personal injury arising from the breach of construction contract even though there are separate statutes of repose for improvements to real estate.<sup>209</sup>

Unwritten or implied-contract limitations statute usually provides the shorter period than that is provided for the written contracts.<sup>210</sup>

Some courts interpret that the cause of action for breach of contract accrues on the date of the breach.<sup>211</sup> Taking breach of warranty case as another example, if the plaintiff brings the suit claiming breach of warranty, the accrual commences when the seller tenders delivery of goods although the seller does not know the breach.<sup>212</sup> Additionally, the parties to a contract may agree

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<sup>207</sup> See CORMAN, *Id.* at 310; see also David J. Marchitelli, Annotation, *Causes of Action Governed by Limitations Period in UCC § 2-725*, 49 A.L.R.5th 1, § 40(a) (1997).

<sup>208</sup> See CORMAN, *Id.* at 311; see also Marchitelli, *Id.* §§ 40(b)(c); Parish v. B. F. Goodrich Co., 235 N.W.2d 570 (Mich. 1975); Martin v. Julius Dierck Equip. Co., 374 N.E.2d 97 (N.Y.1978); see also RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1979).

<sup>209</sup> See CORMAN, *Id.* at 312; see also Berns Constr. Co. v. Miller, 491 N.E.2d 565 (Ind. Ct. App. 1986).

<sup>210</sup> See CORMAN, *Id.* at 287-98, 303.

<sup>211</sup> See CORMAN, *Id.* at 375-76; see also Burke v. Hamilton Beach Div., Scovill Mfg. Co., 424 A.2d 145 (Me. 1981); Bullen v. Roto Finishing Sys., 435 So. 2d 1256 (Ala. 1983).

<sup>212</sup> See CORMAN, *Id.* at 496; see also Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980); Johnson v. Hockessin Tractor, Inc., 420 A.2d 154 (Del. 1980); Stumler v. Ferry-Morse Seed Co., 644 F.2d 667 (7th Cir. 1981); see also U.C.C. § 2-725 (AM. LAW INST. & UNIF. LAW COMM'N 2002).

upon a shortened contractual limitations period to replace a statute of limitations, as long as it is reasonable.<sup>213</sup>

## **1.2 The Statute of Limitations for Tort Claim**

The time limitations for tort claim vary from state to state.<sup>214</sup> In negligence cause of action, the plaintiff is often required to commence the claim within two or three years from the date the cause of action accrues.<sup>215</sup>

Regarding cause of action in tort, the beginning of the limitation period depends on the occurrence of the harm.<sup>216</sup> Some courts recognized the damage rule that requires the actual damages as the essential element of a negligence cause of action.<sup>217</sup> In other words, all elements necessary to the cause of action, such as tort of legal malpractice claim,<sup>218</sup> must occur in order to maintain the claim.<sup>219</sup> So the tort cause of action traditionally accrues when damages occur.<sup>220</sup> In addition, the concept of continuing wrong may postpone the time of accrual of the cause of

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<sup>213</sup> *Zerjal v. Daech & Bauer Constr., Inc.*, 939 N.E.2d 1067 (Ill. 2010).

<sup>214</sup> *See* DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 427.

<sup>215</sup> *See* DOBBS, HAYDEN & BUBLICK, *Id.* at 427.

<sup>216</sup> *See* CORMAN, *supra* note 104, at 376; *see also* Siegel Oil Co. v. Gulf Oil Corp., 701 F.2d 149 (Temp. Emer. Ct. App. 1983).

<sup>217</sup> *See* CORMAN, *Id.* at 376; *see also* Davies v. Krasna, 535 P.2d 1161 (Cal. 1975); United States v. Gutterman, 701 F.2d 104 (9th Cir. 1983); Stuard v. Jorgenson, 150 Idaho 701, 249 P.3d 1156 (2011).

<sup>218</sup> *See* CORMAN, *Id.* at 561; *see also* Jepson v. Stubbs, 555 S.W.2d 307 (Mo. 1977); Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980); Shideler v. Dwyer, 275 Ind. 270, 417 N.E.2d 281 (1981); McConico v. Romeo, 561 So. 2d 523 (Ala. 1990).

<sup>219</sup> *See* CORMAN, *Id.* at 526.

<sup>220</sup> *See* CORMAN, *Id.* at 526; *see also* Premium Mgmt., Inc. v. Walker, 648 F.2d 778 (1st Cir. 1981); Pioneer Nat'l Title Ins. Co. v. Andrews, 652 F.2d 439 (5th Cir. 1981); Norris v. Grosvenor Mktg., Ltd., 803 F.2d 1281 (2d Cir. 1986).

action in tort while this concept does not apply to action for breach of contract.<sup>221</sup> These can explain why the time limited for tortious action may expire later than that of the contractual claim. However, when the plaintiff's claim involves intentional tort, the limitation period begins to run at the date of wrong act because the damage is not the essential elements of actions.<sup>222</sup> Remarkably, the discovery rule also be adopted to determine the beginning point of the limitation period in case of the claim for the latent injury<sup>223</sup> and the action in tort of medical malpractice<sup>224</sup> as well as legal malpractice.<sup>225</sup>

The characterization of claim has affected the plaintiff's right to relief in respect of time limitations specially in concurrent claim. The court at times held that the action sounds in tort by looking at the gravamen of the action even though the plaintiff makes an attempt to allege breach of contract in order to get the benefit of the longer limitation period.<sup>226</sup> However, the court also considered the nature of the contractual obligation to apply the contract statute of limitations to

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<sup>221</sup> See CORMAN, *Id.* at 487.

<sup>222</sup> See CORMAN, *Id.* at 529; *see also* E. J. Spires, Annotation, *Scope of Limitation Statutes Specifically Governing Assault and Battery*, 90 A.L.R.2d 1230 (1963).

<sup>223</sup> See CORMAN, *Id.* at 534.

<sup>224</sup> See CORMAN, *Id.* at 549; *see also* Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976); Teller v. Schepens, 411 N.E.2d 464 (Mass. 1980); Oliver v. Kaiser Cmty. Health Found., 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983); Long v. Jaszczak, 688 N.W.2d 173 (N.D. 2004); *see also* David P. Chapus, Annotation, *Medical Malpractice: Statute of Limitations in Wrongful Death Action Based on Medical Malpractice*, 70 A.L.R.4th 535 (1989); Sara L. Johnson, Annotation, *Medical Malpractice: Applicability of "Foreign Object" Exception in Medical Malpractice Statutes of Limitations*, 50 A.L.R.4th 250 (1986); *see also* DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 430.

<sup>225</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1180; *see also* Vastano v. Algeier, 178 N.J. 230, 837 A.2d 1081 (2003); Bank of N.Y. v. Sheff, 854 A.2d 1269 (Md. 2004); Guest v. McLaverty, 332 Mont. 421, 138 P.3d 812 (2006); Bleck v. Power, 955 A.2d 712 (D.C. 2008).

<sup>226</sup> See CORMAN, *supra* note 104, at 333; *see also* Equilease Corp. v. State Fed. Sav. & Laon Asso., 647 F.2d 1069 (10th Cir. 1981).



the action claiming for damage caused by defendant's negligent failure to perform duties arising out of a contract.<sup>227</sup>

## **2. Statute of Limitations under English Law**

The question as to whether the plaintiff's cause of action is barred by limitation period is governed by the Limitation Act 1980. The action is barred if the plaintiff does not commence his claim for the right to remedies within the fixed period of time.<sup>228</sup> In such situation the plaintiff has the burden of proving that his claim is asserted within the limitation period.<sup>229</sup>

### **2.1 The Statute of Limitations for a Breach of Contract Claim**

It is imposed that "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."<sup>230</sup> A contract made by deed is referred to a "specialty" under the Limitation Act 1980 Section 8(1) and the twelve years of limitation period is applied.<sup>231</sup> These general limitation periods are subject to numerous exceptions such as the extension of limitation period in case of disability<sup>232</sup> or the postponement of limitation period in case of concealment of the facts relevant to the plaintiff's right of action.<sup>233</sup> However, it is generally accepted that the parties are allowed to set their own

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<sup>227</sup> See CORMAN, *Id.* at 337; *see also* Steiner v. Wenning, 373 N.E.2d 366 (N.Y. 1977); Wright v. Sears, Roebuck & Co., 355 So. 2d 353 (Ala. 1978).

<sup>228</sup> See BURROWS, *supra* note 45, at 159.

<sup>229</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 33-03.

<sup>230</sup> Limitation Act 1980, c. 58, § 5 (Eng.).

<sup>231</sup> See BURROWS, *supra* note 45, at 159; *see also* Limitation Act 1980, c. 58, § 8(1) (Eng.).

<sup>232</sup> Limitation Act 1980, c. 58, § 28 (Eng.).

<sup>233</sup> Limitation Act 1980, c. 58, § 32 (Eng.).

limitation periods and the starting point of period of time as a term of contract.<sup>234</sup> The contractual term of limitation period is valid but the term is subject to the general law on validity particularly, under the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.<sup>235</sup> Generally, the date of the commencement for breach of contract action is the date of the breach of the contract even if no loss has been suffered at that date.<sup>236</sup>

## 2.2 The Statute of Limitations for Tort Claim

It is provided that “An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued”<sup>237</sup> While the cause of action accrues at the date of defendant’s wrongful act in the case of tort actionable per se, in the case of negligence which is actionable only on the proof of damage, the cause of action accrues at the time the damage actually occurs.<sup>238</sup>

In addition, the period of three years is the special time limit for actions in respect of personal injuries. The rule states that this three-year period is applicable to

“any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.”<sup>239</sup>

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<sup>234</sup> See BURROWS, *supra* note 45, at 162.

<sup>235</sup> See BURROWS, *Id.* at 162.

<sup>236</sup> See BURROWS, *Id.* at 160; *see also* JOSEPH CHITTY, CHITTY ON CONTRACTS ¶ 28-032 (H.G. Beale 32nd ed. London: Sweet & Maxwell: Thomson Reuters, 2015).

<sup>237</sup> Limitation Act 1980, c. 58, § 2 (Eng.).

<sup>238</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 33-09; *see also* Cartledge v. E Jopling & Sons Ltd. [1963] AC 758 (HL) (appeal taken from Eng.).

<sup>239</sup> Limitation Act 1980, c. 58, § 11 (Eng.).

The period of three years begins to run from “(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured.”<sup>240</sup>

In case of negligence cause of action for recover any form of latent damage, the action shall not be brought after either six years from the date which cause of action accrues or three years from the date on which the plaintiff had the knowledge of certain facts required for bringing an action for damages if this period expires later.<sup>241</sup> Importantly, the latent damage provisions contained in Section 14A of the Limitation Act 1980 only apply to tort claims.

Furthermore, there is the time limit for negligence actions not involving personal injuries whether or not the plaintiff is aware of damages.<sup>242</sup> Limitation Act 1980 Section 14B provides that:

“an action for damages for negligence, other than one to which section 11 of the Limitation Act 1980 applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission--(a) which is alleged to constitute negligence; and (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).”<sup>243</sup>

In general, regarding the date of commencement, the accrual of negligence cause of action accrues at the date on which the negligent conduct has caused damage whereas the cause of action for breach of contract accrues when the contract is broken. Due to the difference of the date of accrual of contract and tort action, the plaintiff may have a longer limitation period in tort

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<sup>240</sup> Limitation Act 1980, c. 58, § 11(4) (Eng.).

<sup>241</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 33-11; see also Limitation Act 1980, c. 58, § 14A (Eng.).

<sup>242</sup> See CLERK & DUGDALE, *Id.* ¶ 33-11.

<sup>243</sup> Limitation Act 1980, c. 58, § 14B (Eng.).

than in contract.<sup>244</sup> It is true even if in the case of bailment claim. To illustrate, where there is a breach of bailment contract, if the plaintiff sues in wrongful conversion as for a tort, the six years runs from the date of demand and refusal but if the plaintiff sues in contract, the six years runs forthwith from the breach of contract.<sup>245</sup>

In conclusion, with comparison to the statute of limitation under breach of contract claim, in some certain types of tort claim, the plaintiff has a longer limitation period for commencing his claim. This may be because the statutory limitation is longer. Or it may be because the occurrence of the cause of action in tort occurs later than that of contractual action. Or it may be because of the application of the limitation period for latent damages.<sup>246</sup> As can be seen, in most concurrent cases the plaintiffs choose to rely on the tort claim when the contractual claim is barred by statutes of limitation.

#### **D. The Effect of Exculpatory Clause**

In some situations, it is unacceptable to allow the plaintiffs suing in tort when the contract action is not available in particular where there appears either the express or implied term of a contract between plaintiff and defendant to exclude contractual liability or there is an express disclaimer by the defendant. In such situations, the issues of interpretation and statutory validity arise both for contractual terms and disclaimers. If the exculpatory clause or disclaimer is valid, this will raise the policy question as to whether we should let the plaintiff makes a claim in tort

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<sup>244</sup> See BURROWS, *supra* note 45, at 160; see also See CLERK & DUGDALE, *supra* note 61, ¶ 33-16.

<sup>245</sup> HENRY THOMAS BANNING, THE LAW OF THE LIMITATION OF ACTIONS: TOGETHER WITH SOME OBSERVATIONS ON THE EQUITABLE DOCTRINES OF LACHES (OR DELAY) AND ACQUIESCENCE 70 (Archibald Brown 3rd ed., 1906).

<sup>246</sup> Latent Damage Act 1986, c. 37 (Eng.).

when it is apparent that he chooses to assert tort claim to avoid an exculpatory clause or a disclaimer that he agreed to in a contract. It might be that courts will not assist a plaintiff who was not vulnerable or dependent, but whose relationship and bargaining position with the defendant gave the opportunity for negotiation of a contractual term to cover the issue, but the plaintiff did not take it. It is noteworthy that the preliminary question arises whether the exculpatory clause of the disclaimer is valid. To answer such question, it is thus necessary to consider the U.S. and English law with regard to the validity of exculpatory clause for both contractual claims and tort ones.

## **1. The Validity of Exculpatory Clause under U.S. Law**

### **1.1 The Exclusion of Contractual Liability**

In general, parties are free to make the agreements as they wish, and the court will enforce them without passing on their substance.<sup>247</sup> However, the court may decide that the interest in party autonomy is outweighed by some other interest, especially public policy, and will refuse to enforce the agreement or some terms of it.<sup>248</sup> When the court refuses to enforce an agreement on grounds of public policy, the court may hold that part of the agreement is enforceable though another part of it is not.<sup>249</sup>

The contract terms may be governed by the concept of unconscionability that is one of the public policy concerns. Uniform Commercial Code Article 2 (UCC 2-302) deals with unconscionable contracts and terms of the contracts. This rule of unconscionability has wisely

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<sup>247</sup> See FARNSWORTH ET AL., *supra* note 9, at 313.

<sup>248</sup> See FARNSWORTH ET AL., *Id.* at 313; *see also* Lucier v. Williams, 366 N.J. Super. 485, 841 A.2d 907 (Super. Ct. App. Div. 2004).

<sup>249</sup> See FARNSWORTH ET AL., *Id.* at 314.

applied, either by analogy or as an expression of a general doctrine, to many other kinds of contracts, including contracts that fall under other articles of the Code.<sup>250</sup> The Restatement Second of Contracts contains a section on unconscionability patterned after the Code's and applicable to contracts generally. This general rule provides that:

“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”<sup>251</sup>

The parties sometimes agree to incorporate the provisions to exclude or limit their contractual liability that amounts to tortious liability.<sup>252</sup> It is submitted that a party cannot exempt itself from liability in tort for harm that it causes intentionally or recklessly.<sup>253</sup> However, a party generally can exempt itself from liability or limit its liability in tort for harm cause by negligence, so long as the provision is not unconscionable.<sup>254</sup> In exceptional cases, however, courts have held such an agreement unenforceable because the agreement affects the public interest and the other party is a member of the protected class. For example, first, an employer cannot exempt itself from liability in negligence to it employee.<sup>255</sup> Second, a common carrier or a public utility cannot exempt itself from liability in negligence to one it has

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<sup>250</sup> See FARNSWORTH ET AL., *Id.* at 298-99.

<sup>251</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

<sup>252</sup> *Zerjal v. Daech & Bauer Constr., Inc.*, 939 N.E.2d 1067 (Ill. 2010).

<sup>253</sup> See FARNSWORTH ET AL., *supra* note 9, at 320; *see also* *Martin Marietta Corp. v. Int'l Telecomms. Satellite Org.*, 991 F.2d 94 (4th Cir. 1992).

<sup>254</sup> See FARNSWORTH ET AL., *Id.* at 320; *see also* *O'Callaghan v. Waller & Beckwith Realty Co.*, 155 N.E.2d 545 (Ill. 1958). *But see* U.C.C. § 1-302 (b) (AM. LAW INST. & UNIF. LAW COMM'N 2001) (“The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement.”).

<sup>255</sup> See FARNSWORTH ET AL., *Id.* at 320; *see also* *Pittsburgh, C., C. & S. L. Ry. Co. v. Kinney*, 115 N.E. 505 (Ohio 1916).

contracted to serve in that capacity, although it may be allowed to limit its liability to a reasonable agreed value in return for a lower rate.<sup>256</sup> Therefore, when the court found that the contract contains an exculpatory clause that is unenforceable on grounds of public policy, the court inclines to refuse to enforce such term.<sup>257</sup> As a result, the court will generally enforce the rest of the agreement.

## **1.2 The Exclusion of Tortious Liability**

The parties to the contract can agree to bear the risk of injury although such risk is caused by the other's negligent conduct.<sup>258</sup> However, any forms of the exemptions of tort liability such as disclaimer of responsibility, a release or exculpatory agreement may be unenforceable because of the laws of contract enforceability,<sup>259</sup> public policy,<sup>260</sup> or other state laws.<sup>261</sup> Some states consider a release to be void if such release attempts to waive liability for grossly negligent,

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<sup>256</sup> See FARNSWORTH ET AL., *Id.* at 320; *see also* Curtiss-Wright Flying Serv., Inc. v. Glose, 66 F.2d 710 (3d Cir. 1933); Libby v. St. Louis, I. M. & S. Ry. Co., 137 Mo. App. 276, 117 S.W. 659 (1909).

<sup>257</sup> See FARNSWORTH ET AL., *Id.* at 346.

<sup>258</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 410; *see also* Cohen v. Five Brooks Stable, 159 Cal. App. 4th 1476, 72 Cal. Rptr. 3d 471 (2008); Deuley v. DynCorp Int'l, Inc., 8 A.3d 1156 (Del. 2010), *cert. denied*, 563 U.S. 938, 131 S. Ct. 2119 (2011).

<sup>259</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 411; *see also* Zipusch v. LA Workout, Inc., 155 Cal. App. 4th 1281, 66 Cal. Rptr. 3d 704 (2007).

<sup>260</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 411; *see also* RESTATEMENT (SECOND) OF TORTS § 496B (AM. LAW INST. 1979); Vodopost v. MacGregor, 913 P.2d 779 (Wash.1996); Yauger v. Skiing Enters., 206 Wis. 2d 76, 557 N.W.2d 60 (1996); Gavin W. v. YMCA of Metro. L.A., 106 Cal. App. 4th 662, 131 Cal. Rptr. 2d 168 (2003); Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734 (Conn. 2005).

<sup>261</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 409; *see also* Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005); Finch v. Inspectech, Ltd. Liab. Co., 229 W. Va. 147, 727 S.E.2d 823 (2012).

reckless, or intentional conduct.<sup>262</sup> In addition, the exculpatory clause that attempts to exclude liability for negligence must be explicitly stated in contract.<sup>263</sup>

## **2. The Validity of Exculpatory Clause under English Law**

### **2.1 The Exclusion of Contractual Liability**

It is important to consider the validity of the exculpatory clause since this kind of exclusion of contractual liability has greatly affected the imposition of tortious duty of care under English law. As for the enforceability of the exemption clauses, if such clauses are included in contract between the parties who one of them is not consumer- that is the business to business contracts, this contract is governed by the Unfair Contract Terms Act 1977.<sup>264</sup> This act is generally being applied to the business liability in the case of both contract and tort, except for contract for the sale of goods or hire-purchase.<sup>265</sup> This act imposes the rule to restrict the parties' right to exclude or limit their liabilities if such liabilities is subject to the act. For example, the party cannot agree to exclude or limit liability for death or personal injury arising out of breach of any contractual obligation to take reasonable care, or breach of any duty of care in tort.<sup>266</sup> Another restriction is that the party cannot exclude or limit liability for damages other than death or personal injury, unless the contract term satisfies the reasonableness requirement.<sup>267</sup> In

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<sup>262</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 410; *see also* *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190 (Pa. 2012).

<sup>263</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 411; *see also* *Donahue v. Ledgends, Inc.*, 331 P.3d 342 (Alaska 2014).

<sup>264</sup> See BURROWS, *supra* note 45, at 98.

<sup>265</sup> Unfair Contract Terms Act 1977, c. 50, §§ 1(3),6(4) (Eng.).

<sup>266</sup> Unfair Contract Terms Act 1977, c. 50, § 2(1) (Eng.).

<sup>267</sup> Unfair Contract Terms Act 1977, c. 50, § 2(2) (Eng.).



addition, when one of the contracting parties deals on the other's written standard terms of business, the other party cannot by reference to contract term exclude or limit his liability in relation to his breach of contract, unless such contract term satisfies the requirement of reasonableness.<sup>268</sup> According to a requirement of reasonableness, the question arises as to whether the term is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."<sup>269</sup> The party who claims the exemption clause has the duty of proving the reasonableness of that contract term.<sup>270</sup>

Turning to consider the enforceability of exemption term included in consumer contracts, the rules of the Consumer Rights Act 2015 are applied in invalidating the exemption clauses. For instance, a trader cannot exclude or limit liability for death or personal injury that arises from breach of an express or implied contractual obligation to use reasonable care in a consumer contract, or from breach of a duty of care in tort.<sup>271</sup> The other exclusion of liability is also governed by the Consumer Rights Act 2015 Section 62 that generally governs any unfair term of a consumer contract. The unfair term is not binding on the consumer if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.<sup>272</sup> However, Section 62 does not affect the operation of: 1) exclusion of liability:

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<sup>268</sup> Unfair Contract Terms Act 1977, c. 50, § 3(1), (2) (Eng.).

<sup>269</sup> Unfair Contract Terms Act 1977, c. 50, § 11(1) (Eng.).

<sup>270</sup> Unfair Contract Terms Act 1977, c. 50, § 11(5) (Eng.).

<sup>271</sup> Consumer Rights Act 2015, c. 15, § 65 (Eng.).

<sup>272</sup> Consumer Rights Act 2015, c. 15, § 62 (Eng.).

goods contracts;<sup>273</sup> 2) exclusion of liability: digital content contracts<sup>274</sup> and 3) exclusion of liability: services contracts.<sup>275</sup>

It has been considered that imposing tortious duty of care owed by the contracting party will be inconsistent with the contractual terms if the exculpatory clause is valid under either the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015 as the case may be. In this case the court will not allow the concurrent tort claim in such situation.

## **2.2 The Exclusion of Tortious Liability**

In general, under the doctrine of *volenti non fit injuria*, the express or implied agreement between the plaintiff and defendant to release the defendant's responsibility is enforceable if they have agreed before the act of negligence occurs.<sup>276</sup> Nevertheless, the agreement that resolves the defendant from legal responsibility of his negligent conduct is treated as the exculpatory clause that falls within the restriction of the Unfair Contract Terms Act 1977 Section 2. This act imposes the rule to restrict the parties' right to exclude or limit their liabilities if such liabilities are subject to this act such as liability for death or personal injury arising out of breach of any duty of care in tort or liability for damages other than death or personal injury that does not satisfy the reasonableness requirement.<sup>277</sup> In addition, there is the prohibition on exclusions from liability under the Consumer Protection Act 1987 Section 7<sup>278</sup> which provides that the

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<sup>273</sup> Consumer Rights Act 2015, c. 15, § 31 (Eng.).

<sup>274</sup> Consumer Rights Act 2015, c. 15, § 47 (Eng.).

<sup>275</sup> Consumer Rights Act 2015, c. 15, § 57 (Eng.).

<sup>276</sup> See CLERK & DUGDALE, *supra* note 61, ¶¶ 3-80-81; see also *Nettleship v. Weston* [1971] 2 QB 691 (CA) (appeal taken from Eng.).

<sup>277</sup> Unfair Contract Terms Act 1977, c. 50, § 2 (Eng.).

<sup>278</sup> Consumer Protection Act 1987, c. 43, § 7 (Eng.).

liability to a person who has suffered damage caused wholly or partly by a defect in a product shall not be limited or excluded by any means including contract term, notice or provision.

### **E. Summary**

Indeed, most rules and principles of either contract law or tort law of U.S. and English systems are quite similar. However, U.S. laws may vary from state to state while English jurisdiction will apply the same laws to any disputes occur in such jurisdiction. Apart from English common law, English legislative branch also develops some laws in relation to both contract and tort in the form of statutory laws such as Contracts (Rights of Third Parties) Act 1999, Unfair Contract Terms Act 1977, Limitation Act 1980, Law Reform (Contributory Negligence) Act 1945, and Consumer Protection Act 1987 etc. These legislative laws have influenced on the occurrence of concurrent issues and affected the recognition of the concurrent tort claims in English Jurisdiction. Although U.S. legislatures do not enact so much statutory laws in the fields of contract and tort law, the issue of concurrent claims has been prevailing throughout the U.S jurisdictions. Also, the recognition of concurrent tort claims has been affected by U.S. common law of contract and tort law. The plausible reasons why the plaintiffs have a preference for tort claim over contract claim or vice versa would be the differences between contract and tort law in each legal system which could affect the more advantageous rights granted to them. As to forgoing explanation, all reasons could be (1) broader scope of remedies; (2) more favorable limitations period; (3) getting around a lack of privity; (4) getting around an exculpatory clause.

### III. THE HISTORICAL DEVELOPMENT OF CONCURRENT CLAIM

This Chapter will illustrate the development of contract law and tort law in relation to the concurrent situation as in general in common law legal system throughout the period of time.

In English jurisdictions, at the beginning of the second half of the 20th century until the recognition of concurrent liability in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 185, it seems that courts adopted something very like the French's approach (The *non-cumul* principle) in particular cases concerned with liability for solicitors' negligence, holding that a claim against a solicitor for negligence must be pursued in contract, and not in tort.<sup>279</sup>

The case arising in the borderland of tort and contract began with a claim of negligence against the person who engaged in a trade or common calling such as the case of a ferryman who negligently overloaded his boat and drowned the plaintiff's horse; the case of a surgeon who negligently operated on his patient; the case of carpenter who built unskillfully and a barber who injured the plaintiff's face.<sup>280</sup> Those foregoing cases were sued in the form of trespass on the case that is a kind of tort claims.<sup>281</sup> After that the action on the case for negligent conduct was expanded to the bailment cases by applying the notion of an assumpsit of the defendant's undertaking to serve the plaintiff.<sup>282</sup> The reason why the actions were brought in the form of tort was because all proceeding actions was originally in the form of tort actions.<sup>283</sup> Later, the action of assumpsit has separated from the action on the case and has become a contract action. By

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<sup>279</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 185 (appeal taken from Eng.) (this view is stated by Lord Goff in *Henderson's* case.).

<sup>280</sup> WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN FEBRUARY 2, 3, 4, 5, AND 6, 1953* 381-82 (William S Hein Reprint ed. 1982).

<sup>281</sup> *See* PROSSER, *Id.* at 382.

<sup>282</sup> *See* PROSSER, *Id.* at 384.

<sup>283</sup> *See* PROSSER, *Id.* at 384.

considering the development of both tort and contract cause of actions, there is the view that it is still possible to maintain the tort action on the case in any contract situation.<sup>284</sup> Ultimately, it was clear that the notion of assumpsit would lie for any breach of contract. However, in certain situations there might still maintain a remedy in tort action.<sup>285</sup>

When Tort and Contract became the separate area, it is necessary for the court to determine the limits of the tort action. In other words, the English court has to determine whether there must be an election of the remedy or whether the cause of action pleaded in the case at bar was the one in contract or the other in tort.<sup>286</sup> So it appeared that at one time the actions against the carrier<sup>287</sup> and the bailee<sup>288</sup> were treated as the pure contract.

Finally, English courts have recognized the choice of the substantive rights of plaintiff by considering the substance of the action pleaded in order to make a classification.<sup>289</sup> Interestingly, it was said that the U.S. courts have followed the earlier English decisions, but courts also have their own confusion.<sup>290</sup> The primary and significant question the courts have to find the answer

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<sup>284</sup> See PROSSER, *Id.* at 384.

<sup>285</sup> See PROSSER, *Id.* at 386.

<sup>286</sup> See PROSSER, *Id.* at 386.

<sup>287</sup> See PROSSER, *Id.* at 386; *see also* *Boson v. Sandford*, 3 Salk. 203, 91 Eng. Rep. 777 (1690); *Dalston v. Janson*, 5 Mod. Rep. 89, 87 Eng. Rep. 538 (1700); *Powell v. Layton*, 127 Eng. Rep. 669 (1806).

<sup>288</sup> See PROSSER, *Id.* at 386; *see also* *Coggs v. Barnard*, 1 Comyns 133, 92 Eng. Rep. 999 (1703).

<sup>289</sup> See PROSSER, *Id.* at 386-87.

<sup>290</sup> See PROSSER, *Id.* at 387.

is that when does the breach of contract also meet the required elements of torts? There is also the view that contract itself is the important factor and source of tort obligation.<sup>291</sup>

Considering English decision, there exists an opinion provided that “Wherever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract.”<sup>292</sup> More importantly, concurrent liability between breach of contract and tort was clearly recognized in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, (HL) which will be thoroughly discussed in Chapter five.<sup>293</sup> In *Henderson*, Lord Goff discussed the two possible approaches about the effect of the contractual relationship in excluding duty of care in tort: the first view that is taken in France is that the contract excludes a remedy in tort: the second approach that is taken in Germany is that contractual and tort claims may be concurrent. After having analyzed the authorities, Lord Goff accepted the view that the existence of contractual contract does not exclude the concurrent duty in tort. Lord Goff said that:

“But, for present purposes more important, in the instant case liability can, and in my opinion should, be founded squarely on the principle established in *Hedley Byrne* itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.”<sup>294</sup>

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<sup>291</sup> See PROSSER, *Id.* at 400; see also *Dean v. Hershowitz*, 177 A. 262 (Conn. 1935).

<sup>292</sup> See PROSSER, *Id.* at 406-07; see also *In Brown v. Boorman*, 11 Cl. & F. 1, 8 Eng. Rep. 1003, 1018 (1844).

<sup>293</sup> See BURROWS, *supra* note 45, at 46.

<sup>294</sup> *Henderson v Merrett Syndicates Ltd.*, [1995] 2 AC 145 (HL) 194 (appeal taken from Eng.).

However, the party must keep in mind that he cannot have double recovery by judgment satisfied for more than one monetary remedy based on both causes of action.<sup>295</sup> It is clear that though the court has accepted the principle of concurrence, this does not deny the parties' freedom to include a term in their contract excluding another cause of action provided that such term is enforceable under the governing rule.<sup>296</sup>

Turning to consider U.S. jurisdiction, there are many cases holding that a carrier is still liable in negligence tort as well as in breach of contract for all damages to the passenger and to the passenger's properties.<sup>297</sup> In such tortious liability of carrier case, the contract is considered only as an incidental. Similarly, the bailee, innkeeper and physician are also held liable in tort for damages arising out of the breach of duty imposed in the parties' relationship.<sup>298</sup> There is the view that the U.S. courts tend to be more liberal in imposing the tortious duty to the case of misfeasance in breach of contract.<sup>299</sup> Until the early 17th century, the *assumpsit* as the primary form for contract and *Case* as a form for tort were overlapped and the action raised by contracting parties could be pleaded in *Case* and vice versa.<sup>300</sup>

It is clearly stated once in the decision of Indiana court<sup>301</sup> that the duty of care is implied from the contractual relationship, and a breach of contractual contract can establish a failure to exercise the duty of care that creates tort liability. When such situation occurs, Indiana court

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<sup>295</sup> See BURROWS, *supra* note 45, at 163.

<sup>296</sup> See BURROWS, *Id.* at 46.

<sup>297</sup> See PROSSER, *supra* note 280, at 403.

<sup>298</sup> See PROSSER, *Id.* at 405-06.

<sup>299</sup> See PROSSER, *Id.* at 407.

<sup>300</sup> See Speidel, *supra* note 22, at 164.

<sup>301</sup> *Flint & Walling Mfg. Co. v. Beckett*, 79 NE. 503, 505 (Ind. 1906).

allowed plaintiff to choose to sue in tort or in contract. In *Flint & Walling Mfg. Co. v. Beckett*, 79 NE. 503, 505 (Ind. 1906), the court referred to Professor Pollock's view that in some cases, the tortious liability may coexist with a liability for breach of contract arising from the same facts towards the same person. The duty of reasonable care is not released merely because of the fact that the parties are under a contract, and may be liable for breach of contract.<sup>302</sup>

However, maybe because of the different protected interests and the origin of legal duties as well as obligations, there appear the conventional views that the areas of tort and contract are entirely distinct and the breach of contract is not in itself a tort.<sup>303</sup> However, it is argued that a rule of law lies behind both tort and contract so that the fields of contract and tort is overlapping.<sup>304</sup> Moreover, tort duties can at times be created by contractual promises.<sup>305</sup>

In the twentieth century, courts have expanded the boundaries of tort by imposing the doctrine of "bad faith breach" in insurance contracts.<sup>306</sup> Until 1984 there are some suggestions that the court should extend this cause of action beyond the insurance cases.<sup>307</sup> However, most jurisdictions refuse to apply tortious liability in usual employment relationship between employer and employee where the employee was discharged by the employer under at-will

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<sup>302</sup> *Id.* at 505-06.

<sup>303</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 7.

<sup>304</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 7.

<sup>305</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 7; *see also* Shadday v. Omni Hotels Management Corp., 477 F.3d 511,512 (7th Cir. 2007).

<sup>306</sup> See FARNSWORTH ET AL., *supra* note 9, at 22.

<sup>307</sup> See FARNSWORTH ET AL., *Id.* at 762.



employment.<sup>308</sup> In addition, California court finally refused tort remedy for noninsurance contract breach in the absence of violation of an independent duty arising from principle of tort law.<sup>309</sup>

In addition, an economic perspective regarding the imposition of tort damages when the party is in the efficient breach is raised in order to criticize the appropriate approach of allowing tort claim.

As to economic perspective, it is argued that even though the imposition of tort damage will invade the principle of sufficient breach, the economic analysis still supports imposing tort damage in the breach of contract. It is supposed that tort damage will be an appropriate and necessary remedy independent of the remedies presented by contract theory if it is imposed to prevents an opportunistic breach of contract.<sup>310</sup> California courts allow tort claim by having relied on the special relationship between the party as the justifiable rationale.<sup>311</sup> However, courts did not discuss, in detail, the factors that are necessary to support that a claim of breach of the implied covenant should sound in tort.<sup>312</sup> Moreover, because there has been the idea that the

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<sup>308</sup> See FARNSWORTH ET AL., *Id.* at 763; *see also* *Bourgeois v. Horizon Healthcare Corp.*, 872 P.2d 852 (N.M. 1994).

<sup>309</sup> See FARNSWORTH ET AL., *Id.* at 763; *see also* *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995).

<sup>310</sup> Barry Perlstien, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOK. L. REV. 877, 879-80 (1992-1993).

<sup>311</sup> *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654 (1958); *Crisci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Commercial Cotton Co., Inc. v. United Cal. Bank*, 163 Cal. App.3d 511, 516 (1985); *Price v. Wells Fargo Bank*, 261 Cal. Rptr. 735, 739 (1989).

<sup>312</sup> *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984) (later, Seaman's holding of tort recovery for bad faith denial of liability under noninsurance contract was overruled by *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995)).

contracting party should not be penalized for the efficient breach,<sup>313</sup> it is suggested that the nature of the breach should be analyzed and defined to justify tort remedies to prevent the deterrence of sufficient breach of contract.<sup>314</sup>

In summary, studying through the historical development shows that the plaintiffs have originally relied on the form of tort actions in all disputes between the parties. However, when both U.S. and English contract laws have been developed separately from tort law, it is likely that the contracting parties' rights have lied in the law of contract to protect parties' expectations. Nevertheless, until the 20 the century both U.S. courts and courts of England have been confronted with the pragmatic problems of concurrent claim between contract and tort. Notably, there exists the recognition of concurrent tortious liability, especially tort of negligence, in certain situations in many kinds of contracts. The concurrent tort claim has been recognized for many reasons raised by courts but it has been restricted for some reasons as well. Interestingly, it is suggested that in recognizing the concurrent tort claim, the court should consider the concept of efficient breach that is developed in U.S. contract law.

#### **IV. CONCURRENT LIABILITY UNDER U.S. LAW**

Negligence cause of action under U.S. law has developed from the action on the Case.<sup>315</sup> Notably, the action on the Case involved the parties whose duties depend upon their relationship

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<sup>313</sup> See Speidel, *supra* note 22, at 166.

<sup>314</sup> See Perlstein, *supra* note 310, at 880.

<sup>315</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 190; *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 399 (2d ed 1981).

by contract or status.<sup>316</sup> The relationship under the contract may require each party to act in the way that can avoid harm to the other party.<sup>317</sup> It has been generally acceptable that the tort liabilities based on fault of defendant are the general basis of liabilities in all cases, in particular, liabilities for other damages other than pure economic loss.<sup>318</sup> However, it also has been accepted that in general, not doing the required act at all or “nonfeasance” does not create the tortious liability. There is nevertheless the tortious liability for “misfeasance.” If the defendant undertakes to perform his duty and then he does not completely perform his duty, this is the kind of “misfeasance” that might be actionable in tort and make the defendant liable for it.<sup>319</sup> In addition, standard of care owed by each party was implicitly imposed by their relationship.<sup>320</sup> Further, there is also an extension of tort liability for nonfeasance. Whenever there is the contractual relationship between the party giving an affirmative duty to act, it has become recognized that there might be tortious liability for nonfeasance.<sup>321</sup>

In the cases where courts recognized concurrent tortious liability either by considering the nature of claim or by adhering to the form of action, the court will provide the justifiable reasons in many respects to support their judgments as we can see in the cases explained in this chapter.

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<sup>316</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 191; see also MILSOM, *Id.* at 304; see also Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184 (1926).

<sup>317</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 191.

<sup>318</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 194; see also *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982).

<sup>319</sup> See PROSSER, *supra* note 280, at 388.

<sup>320</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 191.

<sup>321</sup> See PROSSER, *supra* note 280, at 393; see also *Aircraft Sales & Serv. v. Bramlett*, 254 Ala. 588, 49 So. 2d 144 (1950).

### **A. An Elective Right to Concurrent Tortious Liability**

U.S. court clearly recognized the freedom of election between contract claim and tort claim in *Comunale v. Trader & Gen. Ins. Co.*, 50 Cal. 2d 654 (1958) by stating that “...it is the rule that where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract...”<sup>322</sup> This can be perceived that the tort liability can be raised even though there exists the contractual relationship. Taking the cases of non-compliance with bailment contract as the examples, where the bailment terms require the bailee to return the undamaged goods, courts held that the plaintiff has the choice to sue in either breach of contract or in tort negligence.<sup>323</sup> This means that the contracting party is not compelled to rely only on breach of contract action even though there exist the contractual rights and duties between the parties.<sup>324</sup> In bailment cases, the tort of conversion or negligence is allowed in accordance with the plaintiff’s choice.<sup>325</sup> Moreover, it is conceded in one New York court that tort liability may arise out of or be coincident with contract under the same set of facts and between the same parties.<sup>326</sup> However, in some situations the plaintiff may be compelled to sue only in contract claim. These situations could be the cases that plaintiff will seek for the recovery of economic loss.

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<sup>322</sup> *Comunale v. Trader & Gen. Ins. Co.*, 50 Cal. 2d 654, 663 (1958).

<sup>323</sup> *See* DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 121; *see also* *Celanese Corp. of Am. v. Wilmington*, 46 Del. 114, 78 A.2d 249 (1950); *Vandeventer v. Vandeventer*, 132 Ohio App. 3d 762, 726 N.E.2d 534 (1999).

<sup>324</sup> *See* DOBBS, HAYDEN & BUBLICK, *Id.* at 121.

<sup>325</sup> *See* DOBBS, HAYDEN & BUBLICK, *Id.* at 121.

<sup>326</sup> *Rich v. New York C. & H. R. R. Co.*, 87 N.Y. 382, 390 (1882).

## **B. The Recognition of Concurrent Tortious Liability for Economic Loss**

The economic loss rule is invoked in considering whether the plaintiff can sue in tort action claiming for the suffered damages that are not the physical harms to plaintiff or plaintiff's property. Under economic loss rule, some courts refuse tort claim and insist that plaintiff should rely on contract claim where the plaintiff and defendant have contracted with respect to the matter claimed.<sup>327</sup> This is because courts view that the contracting parties have allocated the economic risk by making an agreement.<sup>328</sup> If the tort liability for economic risks is allowed, tort law will undermine the parties' contractual allocation of responsibilities for economic loss.<sup>329</sup> When the tort claim is excluded by economic loss rule, the plaintiff has to rely on contractual claim even though such claim may be barred by disclaimers, limitation period or damages limitations.<sup>330</sup> Therefore, when pure economic tort rule is invoked in cases where one party claiming that the other negligently perform a contract between them, contract will replace the tort duty of reasonable care and plaintiff can only seek for relief in contract action<sup>331</sup> except for certain circumstances such as in the case of professional negligence such as a legal malpractice claim.<sup>332</sup> So in some legal malpractice actions the claims may be brought as a contract claim and

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<sup>327</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 933; see also *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 43 (Utah 2003), *Exxon Mobil Corp. v. Kinder Morgan Operating Ltd. P'ship*, 192 S.W.3d 120 (Tex. App. 2006); see also Vincent R. Johnson, *The Boundary-Line Function of Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 575-79 (2009).

<sup>328</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1062.

<sup>329</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1062.

<sup>330</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1077, 1080.

<sup>331</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1062; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (AM. LAW INST., Tentative Draft No. 1, 2012).

<sup>332</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 4 (AM. LAW INST., Tentative Draft No. 1, 2012).

a negligence claim and the court may deal with the question as to whether the lawyer violates his tortious duty created by the contract.<sup>333</sup> In such malpractice claims, the economic loss rule does not apply to eliminate negligent liability if the special relationship between the parties is proved.<sup>334</sup> Notably, in proving the element of legal malpractice action, the plaintiff must prove the lawyer's duty being established and imposed from the client-lawyer relationship between them.<sup>335</sup> Therefore, in asserting professional negligence, the plaintiff must take the burden of pleading and proving all essential elements of claim.

### **1. Pleading Both in Contract Claim and Tort Claim in One Suit Is Allowed in Professional Negligence**

Taking the decision of *Kohn, Savett, Klein & Graf, P.C. v. Cohen*, Civil Action No. 89-2173, 1990 U.S. Dist. LEXIS 4150 (E.D. Pa. Apr. 10, 1990) as an example, the court recognized that the plaintiff in a legal malpractice action has a choice in concurrent claim and stated that in Pennsylvania, an action for legal malpractice may be brought in either contract or tort.<sup>336</sup> In *Kohn*, the court held that when this malpractice counterclaim is premised upon the plaintiff's negligent conduct of the case, it sounds in tort. The court also reasoned that although all legal representation virtually occurs within the scope of a contract between lawyer and client, this does not mean that the contractual limitations period automatically applies. The court would rather

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<sup>333</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 1164; *see also* McStowe v. Bornstein, 377 Mass. 804, 388 N.E.2d 674 (1979); Pancake House, Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986); Collins v. Reynard, 154 Ill. 2d 48, 607 N.E.2d 1185 (1992).

<sup>334</sup> EBWS, LLC v. Britly Corp., 181 Vt. 513, 928 A.2d 497, 507-08 (2007).

<sup>335</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 1165.

<sup>336</sup> *Kohn, Savett, Klein & Graf, P.C. v. Cohen*, Civil Action No. 89-2173, 1990 U.S. Dist. LEXIS 4150 (E.D. Pa. Apr. 10, 1990).

look to the terms of the contract allegedly breached and to the nature of the injury asserted.<sup>337</sup> In addition, it is noticeable in this case that the court allowed the different counts of counterclaim claiming both in contract and tort.

When plaintiff is allowed to assert both contract claim and tort claim in one suit, the court must consider the gravamen of complaint to determine the plaintiff's right. In such case, the gist of allegations is significantly considered by the court in finding whether the plaintiff's legal malpractice claim sounds in tort or contract. In *N.Y. Cent. Mut. Ins. Co. v. Edelstein*, 637 F. App'x 70 (3d Cir. 2016), the court held that appellants' Second Amended Complaint in legal malpractice action sounds in tort and agreed with the District Court that appellants' tort claim is untimely. The court reasoned that when the court considered the gravamen of appellants' allegations, it appeared that appellants do not identify a specific contractual obligation in any provisions that appellees failed to perform or point to an explicit agreement or instruction that appellees breached. The court also concluded that this is a case in which the contract between appellants and appellees is best "regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed."<sup>338</sup> By considering the gist of allegations, it is likely that courts allow tort claim in addition to contract action.

## **2. An Adequacy of Asserting Claims Is Required in Legal Malpractice Action**

Plaintiff is required to prove both the essential elements of a breach of a professional duty and the actual loss arising from a breach.

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<sup>337</sup> *Id.* at 11-12.

<sup>338</sup> *N.Y. Cent. Mut. Ins. Co. v. Edelstein*, 637 F. App'x 70, 73 (3d Cir. 2016).

Looking at the requirement of the adequacy of asserting claim in legal malpractice case, in *Stacey v. City of Hermitage*, No. 2:02-cv-1911, 2008 U.S. Dist. LEXIS 29359 (W.D. Pa. Apr. 7, 2008), the court ruled about the ways plaintiff states a valid claim for legal malpractice against defendants under either contract or tort theory. The court applied pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), for evaluating motions to dismiss plaintiff's complaint that asserted claims of legal malpractice, contract, and conspiracy. The standard is that a complaint may not be dismissed unless it appears beyond doubt that the plaintiff cannot prove set of facts in support of his claim which would entitle him to relief. This means that a complaint must allege enough facts to show that a claim is plausible and not merely conceivable. By applying such standard, the court held that the amended complaint not only fails to set forth sufficient facts to establish the elements of a legal malpractice claim but also did not state the basic essentials of an enforceable agreement under assumpsit theory such as offer, acceptance and consideration. Such holding of this court emphasized that in asserting cause of action in concurrent claim, plaintiff is required to explain enough facts proving that defendant's conducts meet all elements of legal malpractice or breach of contract. In particular, for asserting claim of legal malpractice, one of the essential elements is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm. Importantly, a plaintiff must prove "a case within a case" by showing that he had a viable claim in an underlying case and that the attorney was negligent in prosecuting that action.<sup>339</sup>

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<sup>339</sup> *Stacey v. City of Hermitage*, No. 2:02-cv-1911, 2008 U.S. Dist. LEXIS 29359 1, 10 (W.D. Pa. Apr. 7, 2008).



### **3. Concurrent Tort Claim Is Not Excluded under the Independent Duty Doctrine.**

As being discussed above, the right to pure economic loss is generally allowed in a breach of contract claim while such loss is harshly restricted in tort action. It is noteworthy that even if some courts have the same purpose of excluding tort claim because of the economic loss rule, courts choose not to refer to such rules by name and decide the case by considering the gist of the action<sup>340</sup> instead. This lead to the development of independent duty doctrine in the case where the court allowed plaintiff seeking for pure economic loss in tort action rather than action in contract. It may be stated that the exceptions to the economic loss rules are usually provided and illustrated, for example, in the case where the defendant is under the duty of tort that is independent of the contract and the contract does not reflect an intent to make the contractual remedy exclusive.<sup>341</sup>

In *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380 (2010), the Supreme Court of Washington disagreed with the Court of Appeals' interpretation and application of the economic loss rule in limiting the plaintiff' right to contractual remedies. The court argued that an injury is recoverable in tort if such injury traces back to the breach of duty that arises independently from the contractual terms. The court described that Washington law<sup>342</sup> imposes upon every tenant the duty to not cause waste which is a tort duty arising independently out of a lease contract. The duty to not cause waste is considered as independent tort because an early

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<sup>340</sup> See DOBBS, HAYDEN & BUBLICK, *supra* note 5, at 1079; *see also* eToll, Inc. v. Elias/Savion Advert., 811 A 2d 10 (Pa. Supper. Ct. 2002).

<sup>341</sup> See DOBBS, HAYDEN & BUBLICK, *Id.* at 1077; *see also* Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004); Hall Family Props., Ltd. v. Gosnell Dev. Corp. (in re Gosnell Dev. Corp.), 331 F. App'x 440 (9th Cir. 2009); *see also* Johnson, *supra* note 327, at 566-67.

<sup>342</sup> WASH. REV. CODE ANN. § 64.12.020 (LexisNexis 2017).

American authority described such duty as an obligation the tenant owes even if the lease covenants say nothing about the issue.<sup>343</sup> Thus, the court held that the injured lessor can ask for damages concurrently under both in tort and breach of contract. Additionally, in deciding the issue of this case, the court opted the term “independent duty doctrine” instead of the term “economic loss rule” because the permissible tort remedy depends on the existence of independent tort duty<sup>344</sup>, not on whether the injury can be described as an economic loss.

Significantly, although the statutory law imposed the tort law duty to not cause waste, such duty is usually supplemented by a lease covenant allocating responsibility for repairs between the parties. When the lease provisions are violated by one party and the other party suffers from damages, the question usually arises as to whether the economic loss is limited to be remediable under the law of contracts or whether it is also the tort of “waste” within the meaning of provision of statute.<sup>345</sup> Recently, the answer to foregoing question is already provided in the decision in *Eastwood* case that plaintiff can simultaneously commit a breach of lease and a breach of a tort duty that arises independently of the lease’s terms.<sup>346</sup>

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<sup>343</sup> *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380, 398 (2010).

<sup>344</sup> *Robinson Helicopter Co., Inc.*, 102 P.3d 268 (holding that Fraud was separate from party’s breach of contract and breach of warranty. Therefore, plaintiff has the right to the recovery in tort for purely economic loss. The court further explained that business parties can be expected to allocate their risks to which they have contemplated however no business party expects that the other party will defraud it.).

<sup>345</sup> WASH. REV. CODE ANN. § 64.12.020 (LexisNexis 2017).

<sup>346</sup> *Eastwood*, 170 Wash. 2d at 386-87.

### **C. The Recognition of Concurrent Tortious Liability in a Bad Faith Breach of Contract**

In U.S. Jurisdiction, courts are attempting to allow tort damages for bad faith breach of contract. This also illustrate one kind of development in a rigid doctrinal division between tort and contract.<sup>347</sup> The justifiable rationale is that every contract contains an implied covenant of good faith and fair dealing.<sup>348</sup> When the contracting party violates the covenant of good faith and fair dealing, he can thus be held liable in tort. This kind of concurrent tort cause of action being invoked in *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654 (1958). In *Comunale*, the court opined that there is an implied covenant of good faith and fair dealing in every contract including policies of insurance that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. The court in *Comunale v. Trader & Gen. Ins. Co.*, 50 Cal. 2d 654 (1958) created a bad faith breach of insurance contract to impose a tortious liability on insurers who refused to settle the claim asserted by third party.<sup>349</sup> The implied obligations are imposed based upon the principles of fair dealing which enter into every contract even if such duties are not expressly stated in written contract. The court has also emphasized and relied on the test of the existence of the special relationship between insurer and insured when the court held that a tort action is available for breach of the covenant in an insurance contract. This special relationship is characterized by the elements of public interest, adhesion,

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<sup>347</sup> See Perlstein, *supra* note 310, at 877.

<sup>348</sup> See Perlstein, *Id.* at 877; see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

<sup>349</sup> See FARNSWORTH ET AL., *supra* note 9, at 762; see also *Comunale v. Trader & Gen. Ins. Co.*, 50 Cal. 2d 654, 663 (1958).

and fiduciary responsibility.<sup>350</sup> Accordingly, the court ruled that where a case sounds both in contract and tort, the plaintiff will ordinarily have freedom of election between an action of tort and one of contract.<sup>351</sup> Interestingly, this case also mentioned an exception to the freedom of election rule. The exception to elective right is made in some suits for personal injury caused by negligence, where the court considered that the tort character of the action prevails. However, such exception is not applied in this case which related to financial damage. Notably, the court refused applying the doctrine of bad faith breach beyond the insurance contract.<sup>352</sup> Nevertheless, there are some of the U.S. decisions<sup>353</sup> holding that the bad faith withdrawal or termination from the pre-contractual phase of negotiations may result in extra-contractual liability based on the doctrine of promissory estoppel.<sup>354</sup> The court reasoned that the preliminary negotiations generate a social relationship that imposes on the parties the duty to act in good faith, which not only governs legal relationships already established, but also those derived from a simple social contract. Notably, these cases illustrate that under the doctrine of promissory estoppel, U.S. courts also impose the duty of good faith beyond the insurance contract especially in pre-contractual phase of loan agreement.<sup>355</sup>

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<sup>350</sup> *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141 (Cal. 1979); *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158, 1166 (Cal. 1984).

<sup>351</sup> *Comunale*, 50 Cal. 2d at 663.

<sup>352</sup> *Martin v. Fed. Life Ins. Co.*, 440 N.E.2d 998 (Ill. App. 1982).

<sup>353</sup> *Satellite Broad. Cable, Inc. v. Telefonica de Espana, S.A.*, 807 F. Supp. 218 (D.P.R. 1992); *Shelley v. Trafalgar House Pub.*, 977 F. Supp. 95 (D.P.R. 1997); *Cornerstone Siesta Pointe, Inc. v. Sunamerica Hous. Fund* 466, No. 15-60945-CIV-ZLOCH, 2017 U.S. Dist. LEXIS 35531 (S.D. Fla. Mar. 10, 2017).

<sup>354</sup> As to the scope of this thesis, the doctrine of promissory estoppel as a tort-like liability will not be studied in detail in this thesis.

<sup>355</sup> *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336 (D. Mass. 2011).

#### **D. The Recognition of Concurrent Tortious Liability to a Third-party Beneficiary**

Some courts permit non-contracting party who suffers from contracting party's breach of contract to bring lawsuit against breaching party claiming in tort.

There is another California case that the court allowed the third party as the beneficiary of the will to seek for damages in tort by considering the special relationship between the attorney and the intended beneficiary. In, *Heyer v. Flaig*, 70 Cal. 2d 223 (1969), the court concluded that an attorney who negligently fails to fulfill a client's testamentary directions incurs liability in tort for violating a duty of care owed directly to the intended beneficiaries. The duty of care in this case is imposed by considering the contexts of the relationship between the attorney and the intended beneficiary. In this case, the court also referred to the public policy that requires the attorney to exercise his duty to not cause harms to persons whose rights and interests are certain and foreseeable. Ultimately, the court concluded that the complaint stated a sufficient cause of action in tort under the doctrine of *Lucas v. Hamm*, 56 Cal. 2d 583 (1961). In *Lucas*, the court stated that the harmed party not only could recover as an intended third-party beneficiary of the attorney-client agreement providing for legal services but also recover on a theory of tort liability for a breach of duty owed directly to him. The court also cited *Biakanja v. Irving*, 49 Cal. 2d 647 (1958) where the defendant argued that the absence of privity deprives a plaintiff of a remedy for negligence committed in the performance of a contract. The court rejected the defendant's contention and then analyzed that the determination whether the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors including<sup>356</sup> (1) the extent to which the transaction was intended to

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<sup>356</sup> *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958).

affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm. Therefore, the new rule is imposed under California law as to the concurrent situation that the doctrine of privity of contract is not required for a third person who suffers from damages arising from negligent performance of contractual duty.<sup>357</sup>

### **E. The Recognition of Concurrent Tortious Liability due to the Public Policy**

#### **Concern**

There is the view that tort law has intruded into the contract in order to protect public and private interests other than the expectations of the parties.<sup>358</sup> Also, courts find nothing inconsistent in holding that a certain set of facts give rise to a tort action for one purpose, and to an action in contract for another purpose.<sup>359</sup> In so doing, the court's decision is motivated by the public policy behind the rule that is in question before the court in finding the borderline between contractual claim and tort claim.<sup>360</sup>

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<sup>357</sup> *United States use of L.A. Testing Lab. v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958) (holding that by considering policy and all factors in this case, the prime contractor's claim stated against the architect is actionable under the law of California despite its lack of privity of contract.).

<sup>358</sup> *See Speidel, supra* note 22, at 182; *see also Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876, 880 (1981) (holding that employee can alleged the cause of action in tort of retaliatory discharge against the employer who terminated at-will employment contract. This is because such termination of contract violates public policy favoring investigation and prosecution of criminal offenses.).

<sup>359</sup> Peter W. Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOK. L. REV. 196, 197 (1948).

<sup>360</sup> *See Thornton, Id.* at 213.

Taking New York Courts as the example cases that recognized concurrent liability due to the public policy concern, New York court drew the rule regarding the existence of duty of care arising out of the subcontract in *Lord Elec. Co. v. Barber Asphalt Paving Co.*, 226 N.Y. 427 (1919). In *Lord Elec. Co.*, the city of New York entered into a contract with plaintiff for surface construction work on a bridge. After that, plaintiff entered into a contract with defendant to furnish all labor and materials for the asphalt work. It appeared that during the progress of the work, defendant caused a fire which damaged the bridge structure. As a result, plaintiff was held liable under principal contract. Consequently, this case is brought by plaintiff. The ruling of this case imposed the duty of care to the party in performing all duties arising from sub-contractor contract. This court reasoned that the plaintiff agreed with the city to take ample precaution to protect the entire structure against injury by fire. And according to the subcontract, the defendant was also bound to take ample precautions to protect the entire structure against injury by fire caused by it. The court further reasoned that the plaintiff's liability under principal contract should not be extended to cover the entire work. Likewise, the defendant's liability should not be limited to its own work when defendant accepted all the conditions of the principal contract. Therefore, it is fair and reasonable to interpret and impose duty of care to the defendant under the subcontract. Considering the rule on concurrent liability, the court held that plaintiff's allegations and proof were sufficiently broad to enable it to establish a cause of action based on negligence. The court indicated that negligence, considered merely as a tort, is a wrong independent of contract, but negligence may also be a breach of contract if the contract itself calls for care. From the decision in *Lord Elec. Co.*, it is the rule that the plaintiff is allowed to concurrently assert the cause of action of negligence when the contract itself calls for care. In

particular, the court required a fair and reasonable construction of contract between the party in imposing the duty of care on the defendant.

Moreover, other decisions also demonstrate that where the facts in any action appear that the elements of both tort and breach of contract are presented, New York courts may provide the different answers for the questions whether the action is viewed as in tort or in contract. The following situations illustrate that apart from providing the plaintiff's elective right between action in contract and tort,<sup>361</sup> New York courts also determined the essential nature of the action and held that action sounds in tort rather than in contract, for the purpose of solving the issue before the court.<sup>362</sup>

In terms of statute of limitations issue, it is necessary to determine the fundamental nature of the action in order to consider whether it is barred or not. Some cases were held that the tort statute of limitations applied because the courts felt that the gravamen of the claim caused by negligence even though the form of the action was the contract. In *Webber v. Herkimer & M. S. R. Co.*, 109 N.Y. 311 (1888), Court of Appeals of New York held that the carrier is liable to the plaintiff in damages if plaintiff as the passenger suffered from personal injury without his fault. The court reasoned that common carriers of passengers are not insurers of personal safety so when there exists an injury, happening to the person of a passenger, the carriers are only liable for negligence in failing to use due care, diligence or skill in and about their undertaking. However, the action is statutory barred because plaintiff did not submit the claim within the

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<sup>361</sup> *Busch v. Interborough Rapid Transit Co.*, 187 N.Y. 388, 80 N.E. 197 (1907).

<sup>362</sup> *Loehr v. E. Side Omnibus Corp.*, 18 N.Y.S.2d 529 (App. Div. 1940).



limitation of three years. Significantly, in deciding cases under the statute of limitations, courts found cause of action in tort regardless of the plaintiff's form of the action.<sup>363</sup>

In *Loehr v. E. Side Omnibus Corp.*, 18 N.Y.S.2d 529 (App. Div. 1940), the question as to whether a cause of action is barred by the three-year Statute of Limitations is raised. The Court of New York adopted the rule laid down in *Webber* case. The court still held that the cause of action sounds as tort rather than contract even though the facts is apparent that plaintiff's allegation clearly indicated the violation of the term of the contract.

It seems that, for the purpose of statute of limitations issue, courts indicate that negligence conduct gives rise to a tort action despite the fact that the duty was established by contract.<sup>364</sup> Stated another way, if the gravamen of case is found in tort, the plaintiff cannot circumvent the statute of limitations by asserting in contract action. It is also recognized that, if the gravamen sounds in tort, it is justified in asserting tort action which is more favorable for plaintiff.<sup>365</sup>

## **F. Summary**

U.S. law has recognized the elective right of concurrent tort claim, in particular, in cases where the plaintiff brings the suits for the recovery of physical harms to a person or property. However, U.S. law restricts the tort claim in cases where plaintiff is seeking for pure economic loss not resulting from physical harm or physical contact to a person or property. Concurrent tort claim for the recovery of economic loss is permitted only in certain circumstances such as in the

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<sup>363</sup> *Hermes v. Westchester Racing Ass'n*, 210 N.Y.S. 114 (App. Div. 1925).

<sup>364</sup> *See Thornton*, *supra* note 359, at 201.

<sup>365</sup> *Hutchinson v. Smith*, 417 So. 2d 926 (Miss. 1982).

case of professional negligence, claim for bad faith breach of insurance contract. Significantly, U.S. courts are attempting to develop and apply the independent duty doctrine rather than economic loss rule to allow more tort of negligence claims for economic loss. Importantly, in all concurrent cases, the underlying rationales being raised by courts to support concurrent tort claim mostly relate to either the public policy concerns such as solving the issue of limitation period, establishing fairness and reasonableness between the parties or a gap-filling mechanism in contract law such as fulfilling the gap of an absence of privity.

## **V. CONCURRENT LIABILITY UNDER ENGLISH LAW**

Under English law, the concurrent liability between contract and tort is mainly raised and criticized in claims of negligence. The court will be in the dilemma situation to consider whether the tortious duty of care should be imposed on the defendant who is voluntarily bound by the contractual duty. The number of the situations creating an overlap between breach of contract and negligence tort has been risen over the period of time.<sup>366</sup> In particular, the question as to whether the contracting party can sue in tort arises when the tort negligence has been expanded and allowed the plaintiff to recover pure economic loss in some situations.<sup>367</sup> Under English law, it seems unacceptable for imposing the duty of care which is inconsistent with what the parties have agreed especially when the duty of standard of care is more burdensome than the express or implied contractual duty.<sup>368</sup> Therefore, it is likely to be the principle rule that so long

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<sup>366</sup> See BURROWS, *supra* note 151, at 5.

<sup>367</sup> See BURROWS, *Id.* at 5; *see also* Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 (HL) (appeal taken from Eng.); Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp [1979] Ch 384; White v. Jones [1995] 2 AC 207 (HL) (appeal taken from Eng.); Merrett v. Babb [2001] QB 1174 (CA) (appeal taken from Eng.).

<sup>368</sup> See BURROWS, *supra* note 151, at 6.

as the tort negligence is consistent with the terms of contract, there is no objection to the plaintiff choosing to sue either for breach of contract or for the tort of negligence if one of them is considered to be more favorable to the plaintiff.<sup>369</sup> It has appeared that the plaintiff's right to choose to rely on tort of negligence is traditionally accepted in the case where the defendant exercises his duty in the course of the ordinary occupations such as carriers, innkeeper or bailee.<sup>370</sup> Specifically in medical treatment case, the answer to the question arising as to whether there is the concurrent liability in tort is always in the affirmative.<sup>371</sup> Recently, it is apparent that a solicitor who performs his duty for the reward owes the duty both in contract and tort.<sup>372</sup>

There are the controversial views as to the bailment contract such as hire of goods. When the bailee misuse or damages the goods, Winfield viewed that the bailee is not in tort but is liable in breach of contract because the bailee's duty arises from the relationship the parties have agreed.<sup>373</sup> However, this view is argued that the bailor should have the right to claim either breach of specific provision in contract or breach of the bailee's common law duty that amounts to tortious liability.<sup>374</sup> This is because there are tortious duties that can only exist when there has been the prior contract between the parties.

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<sup>369</sup> See BURROWS, *Id.* at 6.

<sup>370</sup> See BURROWS, *Id.* at 6.

<sup>371</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 10-07; *see also* Edwards v. Mallan [1908] 1 KB 1002 (CA) (appeal taken from Eng.).

<sup>372</sup> See CLERK & DUGDALE, *Id.* ¶ 10-101.

<sup>373</sup> See WINFIELD, *supra* note 62, at 10.

<sup>374</sup> See WINFIELD, *Id.* at 10.

### **A. An Elective Right to Concurrent Tortious Liability**

It is possible that both contractual liability and tortious liability co-exist on the same set of facts and the alternative claim for damages is available.<sup>375</sup> In such situation the court allows the tort claim provided that concurrent claim is not expressly or implicitly exclude by contract.<sup>376</sup> In the case where the plaintiff is the contracting party, it is acceptable that where there is the contractual relationship between the parties and the defendant is in breach of contract, the plaintiff may choose to sue in tort instead in order to circumvent the limitations in contract law or to be able to make a claim going beyond what was agreed in the contract.<sup>377</sup> In another situation where the plaintiff is not the party to the contract but the plaintiff suffers from damages because of defendant's breach of contract, the court allows the action in tort because the doctrine of privity precludes a contractual claim. Although most cases have accepted the concurrent tort claim when the issue is raised, it is still controversy in specific situations. And this may be the case of claiming for economic loss in tort action.<sup>378</sup>

### **B. The Recognition of Concurrent Tortious Liability for Economic Loss under the Assumption of Responsibility Doctrine**

As being stated in chapter two, if plaintiff suffers only economic loss arising from defendant's negligent conduct, generally, he will not be allowed to recover such damages under tort claim. However, since there is the decision of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL), lawyers and other professionals could be held in being liable for

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<sup>375</sup> See WINFIELD, *Id.* at 11.

<sup>376</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 1-05.

<sup>377</sup> See CLERK & DUGDALE, *Id.* ¶ 1-05.

<sup>378</sup> See CLERK & DUGDALE, *Id.* ¶ 1-05.

negligence independently of contract. It can be said that the duty of care will arise if the professions undertake any task to provide service for the other that relies on the profession's competence and skill. Under the concept of assumption of responsibility, it also appeared in the case of medical service that the medical practitioner who either provides the treatment gratuitously or performs for the reward is liable for negligent treatment of the patient.<sup>379</sup> English law also implicitly imposed duty of care that is bound by the supplies. Under the Supply of Goods and Services Act 1982 Section 13, there exists the implied duty of the suppliers who perform their task in the course of a business that the suppliers will carry out the service with reasonable care and skill. Hence, when the suppliers negligently breach of duty of reasonable care, this will establish a breach of contract<sup>380</sup> and negligence tort as well.

It is recognized that the assumption of responsibility doctrine plays an essential role in liability for pure economic loss.<sup>381</sup> To illustrate the recognition of concurrent tort liability under the Assumption of Responsibility Doctrine, the following cases will be considered.

To begin with, In *Hedley Byrne*, it appeared that the bankers negligently provided the recipient (a firm of advertising agents) favorable reference for one of their customers. Moreover, when giving the reference in relation to the credit-worthiness of their customers, bankers knew or ought to have known that the plaintiffs would rely on their special skill and judgment in furnishing the reference. And the plaintiffs in fact relied upon the reference provided and then placed the advertising order on behalf of the company (the bank's customer) that later turned out

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<sup>379</sup> See CLERK & DUGDALE, *Id.* ¶ 10-05.

<sup>380</sup> See CLERK & DUGDALE, *Id.* ¶ 10-06.

<sup>381</sup> Andrew Robertson & Julia Wang, *The Assumption of Responsibility*, in THE LAW OF MISSTATEMENTS: 50 YEARS ON FROM HEDLEY BYRNE V HELLER 49, 49 (Kit Barker & Ross Grantham & Warren Swain eds. Hart Publishing, 2015).

not being respectably constituted company and being into liquidation. As a consequence, the plaintiffs suffered financial loss. Accordingly, the question arose whether bankers could be held liable in tort in respect of the gratuitous provision. In *Hedley Byrne*, the facts appeared that the relationship between two parties is not contractual because it is gratuitous (no consideration). But, in principle, the court permitted liability in the absence of consideration by standing in the way of an appropriate allocation of risk on the merits and regarding the consideration as a technicality.<sup>382</sup> The reasons why the House of Lords allowed the liability in the absence of consideration is expressed in two factors. First, courts have often expressed ambiguous, even critical, sentiments about consideration as a requirement for contractual validity.<sup>383</sup> The court gave the reason that without consideration the promise is unenforceable as a contract but if it appears that the service is in fact performed negligently, the tort action should be actionable for recovery damages.<sup>384</sup> Second, courts focused on the economic reality of the relevant relationship and explained that by giving the reference for the customer, the bank received the benefit in some respects as to its business.<sup>385</sup>

Indeed, we can find that English court began with providing the plaintiffs right to tort claim because the contract is unenforceable because of the absence of consideration. Stated simply, in *Hedley Byrne*, plaintiffs could ask the courts to recognize negligence action for recovery of financial loss regardless of persistence of consideration when the court found that

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<sup>382</sup> Janet O’Sullivan, *Suing in Tort Where No Contractual Claim Will Lie – A Bird’s Eye View*, 23 PROF. NEGL. 165, 169 (2007).

<sup>383</sup> See O’Sullivan, *Id.* at 169.

<sup>384</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL) 525-26 (appeal taken from Eng.).

<sup>385</sup> See O’Sullivan, *supra* note 382, at 170.

defendants assumed the responsibility towards the plaintiffs in such circumstances. In other words, the duty of care towards the recipients of information was owned by the bankers. To provide the principle in this case more precisely, we should consider Lord Morris of Borth-y-Gest's opinion which stated that:

“My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”<sup>386</sup>

However, in this case a duty of care was finally negated since there was an express disclaimer of responsibility.

More particularly, the tort liability is clearly allowed in the case of Solicitor's liability. In *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384, the court allows the plaintiff to sue in tort for negligently omitting to register the option as an estate contracts by reason of the existence of the relationship between solicitor and client that is the relation of a client consulting a solicitor for advice.<sup>387</sup> This kind of relation in *Midland Bank Trust Co. Ltd.* gave rise to a duty of care under the *Hedley Byrne* principle.

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<sup>386</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL) 503 (appeal taken from Eng.).

<sup>387</sup> *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384, 433.

Furthermore, in *Midland Bank Trust Co. Ltd.*, Lord Oliver J. gave his opinion that by looking at the speech of Lord Devlin in the *Hedley Byrne*, he believed that Lord Devlin treats the existence of a contractual relationship as very good evidence of the general tortious duty.<sup>388</sup> Therefore, he gave reasons and held that the relationship of solicitor and client gave rise to a duty in the solicitors under the general law to exercise their duty of care and skill upon which they must have known well that their client relied.<sup>389</sup> After that, the decision in *Midland Bank Trust Co. Ltd.* was admitted by the House of Lords in *Henderson v Merrett Syndicates Ltd* 1995 2 AC 145 (HL) holding that defendants owed the duty of care to plaintiffs so that plaintiffs could seek for pure financial loss in tort action even though limitation period in contract claim was barred but it was not in tort claim.

In *Henderson*, the consistent concurrent liability for breach of contract and negligence tort is fully accepted in another type of professional relationship. That is the relationship between Lloyd's Names and their underwriting agents who carry out their underwriting functions towards the Names for whom they acted under the underwriting agency agreement. In *Henderson*, even though there is the contractual relationship between the plaintiffs (Lloyd's Names) and defendants (Managing Agents), plaintiffs (both direct Names and indirect Names) chose to allege a concurrent duty of care in tort. This is because plaintiff wish to be able to get the benefit of the longer limitation period in this case where the date for the accrual of the cause of action in tort occurred later than that in contract. In this case, with respect to the liability of managing agents to Names (both direct and indirect Names) in tort, the court held that plaintiffs could sue in tort to recover damages for pure economic losses. The court further explain that the

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<sup>388</sup> *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384, 415.

<sup>389</sup> *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384, 417, 433.



existence of contractual relationship is not the objection.<sup>390</sup> Moreover, Lord Goff's opinion indicated that the parties can expressly agree to restrict or exclude the tortious liability, provided that such agreement is subject to the ordinary principle of validity.<sup>391</sup>

Looking at the opinion in *Henderson*'s case in detail, we can see that the tortious duty of care is imposed under the concept of assumption of responsibility and tort liability is allowed for the reason of preferable limitation period. Lord Goff reasoned that in the cases of claim against the professional parties such as solicitors or architects, it is possible that the contractual claim is barred by limitation period at the time of breach when the plaintiff is unaware of the existence of breach. So the concurrent liability in tort is necessary to protect the plaintiff when the consequences of party's negligent breach may occur after the lapse of limitation period for contract claim.<sup>392</sup> Lord Goff also referred to the statements and the application of the assumption of responsibility principle that was stated by Lords in *Hedley Byrne*. For instance, Lord Devlin in *Hedley Byrne* opined about the doctrine of assumption of responsibility by saying that:

“categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but also include relationships which...are ‘equivalent to contract’ that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.”<sup>393</sup>

After considering the statements of doctrine, Lord Goff stated that:

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<sup>390</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 10-07; see also *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 194 (appeal taken from Eng.).

<sup>391</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 194 (appeal taken from Eng.).

<sup>392</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 185 (appeal taken from Eng.).

<sup>393</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 (HL) 528-29 (appeal taken from Eng.).

“we can derive some understanding of the breadth of the principle underlying the case. We can see that it rests upon a relationship between the parties, which may be general or special to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other. On this point, Lord Devlin spoke in particularly clear terms... Further, Lord Morris spoke of that party being possessed of a special skill which he undertakes to apply for the assistance of another who relies upon such skill.”<sup>394</sup>

Furthermore, Lord Goff suggested that “...once the case is identified as falling within the Hedley Byrne principle, there should be no need to embark upon any further enquiry whether it is ‘fair, just and reasonable’ to impose liability for economic loss...”<sup>395</sup>

Finally, Lord Goff concluded that the principle of assumption of responsibility has been expressly applied to a number of different categories of person who perform services of a professional or quasi-professional nature, such as bankers, solicitors, surveyors, valuers, accountants and insurance brokers.<sup>396</sup> If the plaintiff relies on the advice or the statement provided by the defendant who has the special skill, the defendant owns the duty of care to the other party and may be held to take responsibility for his negligent conduct. It does not matter whether the defendant carries on the business of giving the kind of advice that is sought or not.<sup>397</sup> Apart from the reasons provided in such three cases mentioned above, it is further explained that

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<sup>394</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 180 (appeal taken from Eng.).

<sup>395</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 181 (appeal taken from Eng.).

<sup>396</sup> *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 181-82 (appeal taken from Eng.).

<sup>397</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 8-105; see also *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801 (CA) (appeal taken from Eng.).

the special relationship is established when the defendant assume responsibility to perform the task rather than the assumption of legal liability to the plaintiff for its careful performance.<sup>398</sup>

### **1. The Tortious Duty of Care Is Denied by the Effect of Exculpatory Provision.**

Even if there is the acceptance of the concurrent liability, the parties are free to include a term in their contract excluding another cause of action.<sup>399</sup> Especially, although there is the special relationship between the parties in the case of undertaking the task of providing a statement or services, the duty of care imposed on the ground of assumption of responsibility is denied where it appears that the defendant disclaims his liability in respect of a statement or services.<sup>400</sup> The disclaimer may be treated as the relevant fact to consider whether the assumption of responsibility should be invoked.<sup>401</sup> Therefore, it is undisputable rule that in principle concurrent tortious liability is recognized. However, it is unacceptable to allow the plaintiff suing in tort when the contract action is not available because of the existence of an express disclaimer by the defendant or the exculpatory terms that are inconsistent with tortious duty of care.<sup>402</sup> Keeping in mind that, both a disclaimer and exculpatory terms are governed by the Unfair Contract Terms Act 1977, the issues of statutory validity and interpretation of

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<sup>398</sup> See CLERK & DUGDALE, *Id.* ¶ 8-88; *see also* White v. Jones [1995] 2 AC 207 (HL) 273-74 (appeal taken from Eng.).

<sup>399</sup> See BURROWS, *supra* note 45, at 46.

<sup>400</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 8-108; *see also* Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 (HL) (appeal taken from Eng.); *see also* Robertson & Wang, *supra* note 381, at 62.

<sup>401</sup> See CLERK & DUGDALE, *Id.* ¶ 8-108; *see also* McCullagh v. Lane Fox & Partners Ltd. [1996] P.N.L.R. 205 (appeal taken from Eng.); First National Commercial Bank Plc v. Loxleys, [1997] P.N.L.R. 211 (appeal taken from Eng.).

<sup>402</sup> See O'Sullivan, *supra* note 382, at 191; *see also* Henderson v. Merrett Syndicates Ltd. [1995] 2 AC 145 (HL) 194 (appeal taken from Eng.).

contractual terms or those of disclaimers may thus arise in concurrent action. Accordingly, only enforceable disclaimer can have an effect on the exclusion of duty of care.<sup>403</sup>

Taking *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) as an example, in this case the plaintiff who purchased a house, which was under construction, from the defendant who was the builder, sued for damages for the expenses in rebuilding as the pure economic loss. The facts appeared that the contract incorporated the National House-Building Council's (NHBC) standard form of agreement which limited the builder's liability for defects to the first two years. The plaintiff also brought the claim against the defendant in tort of negligence to get the advantage of limitation period. The preliminary issue was whether the defendant owed the plaintiff a concurrent duty of care in tort in respect of pure economic loss. Finally, the plaintiff's right to recover pure economic loss was refused by the reason that the duty of care in tort was inconsistent with the contractual term stating that "the defendant's liability to the plaintiff would be limited to that set out in the NHBC agreement and had thereby expressly agreed to exclude any liability which might otherwise arise..."<sup>404</sup> And the court held that such terms were reasonable under the Unfair Contract Terms Act 1977. The reason is stated in Lord Jackson LJ's opinion that "It is not possible for the plaintiff to invoke the law of tort in order to impose liabilities upon the defendant which are inconsistent with the contract."<sup>405</sup>

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<sup>403</sup> *Smith v. Eric S Bush* [1990] 1 AC 831 (HL) (appeal taken from Eng.).

<sup>404</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 45 (appeal taken from Eng.).

<sup>405</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 63 (appeal taken from Eng.).

We can see that English law permits parties to the contract to include the exculpatory clause in order to exclude or restrict tortious liability for financial loss as long as such clause is reasonable under the Unfair Contract Terms Act 1977. This indicates that the parties' right to allocation of risk under contract is still recognized and protected by the court.

## **2. The Tortious Duty of Care Is Denied in Relation to Defective Things Giving Rise to Pure Economic Loss**

Meaningfully, in *Robinson v. PE Jones (Contractors) Ltd.*, we can see that the court also considered the characteristic of relationship between the parties which is normally considered as the key factor in giving the answer to the question as to whether one party assumes the responsibility that gives rise to the tortious duty of care regarding the economic loss. In giving the answer to this question, in *Robinson v. PE Jones (Contractors) Ltd.*, Lord Jackson LJ reasoned that the parties had not been in a professional relationship whereby the plaintiff paid the defendant for advice, reports or plans on which he would rely, but they had entered into a normal contract for the purpose of completing the construction of a house and buying it.<sup>406</sup> Therefore, although there is no limitation of liability clause incorporated in contract, the defendant as the builder did not owe the tortious duty of care in relation to any defect in the building giving rise to pure economic loss. It was further explained that tort law limited more duty of care upon the manufacturer or builder than that on the other professionals. Clearly stated, the manufacturer or builder owes the duty to take reasonable care to protect only suffering personal injury or damage

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<sup>406</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 62 (appeal taken from Eng.).

to other property.<sup>407</sup> In *Robinson v. PE Jones (Contractors) Ltd.*, Lord Jackson LJ considered Lord Goff's opinion in *Henderson's* case and concluded that the essential points of *Henderson's* case are:

“(i) When A assumes responsibility to B in the Hedley Byrne sense, A comes under a tortious duty to B, which may extend to protecting B against economic loss. (ii) The existence of a contract between A and B does not prevent such a duty from arising. (iii) In contracts of professional retainer, there is commonly an assumption of responsibility which generates a duty of care to protect the client against economic loss.”<sup>408</sup>

However, the opinion in *Robinson v. PE Jones (Contractors) Ltd.* has been criticized that it is difficult to explain precisely what it is about giving professional advice or reports that justifies Lord Jackson LJ's opinion.<sup>409</sup>

Interestingly, apart from Lord Jackson LJ's opinion, Lord Stanley Burnton LJ provided another strong opinion that:

“it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss.”<sup>410</sup>

Lord Stanley Burnton LJ further explained that the distinction between the case where the party owes the tortious duty of care and case where the party does not, is the difference of two

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<sup>407</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 59-60 (appeal taken from Eng.).

<sup>408</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 59-62 (appeal taken from Eng.).

<sup>409</sup> Janet O'Sullivan, *Building Contracts – Is There Concurrent Liability in Tort?*, 70 C.L.J. 291, 293 (2011).

<sup>410</sup> *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 64 (appeal taken from Eng.).

parties between a party who supplies defective things which causes damage to person or other properties and a person who supplies defective or valueless things themselves.<sup>411</sup> Taking an architect for example, the architect will owe a duty of care in relation to the building that is defective when being constructed with architect's drawing of specification supplied by him. But the other party cannot sue an architect in tort of negligence action simply because his plans are worthless. From this view, we can see another indication as to the existence of concurrent tortious duty particularly in building contract. That is, to consider whether something that is supplied by one party causes the injury to person or other things. If the answer is in the affirmative, the party who supplies the thing under contract also owes the duty in tort to the other party.

### **3. The Tortious Duty of Care Is Denied by the Effect of Scope of Duties Imposed by the Contract.**

There is another interesting decision that restrict the imposition of tortious duty of care on the contracting party. From this viewpoint, the duty of care in tort can concurrently arise between the parties to the contract if such duty will not be more extensive than the duties imposed by the contract.<sup>412</sup> Put this in another way, the duty in tort will not extend further than the contractual duty to the client.<sup>413</sup>

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<sup>411</sup> Robinson v. PE Jones (Contractors) Ltd., [2011] EWCA Civ 9; [2012] QB 44 (CA) 64 (appeal taken from Eng.).

<sup>412</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 8-103.

<sup>413</sup> See CLERK & DUGDALE, *Id.* ¶ 10-06; *see also* Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] AC 80 (PC) (appeal taken from HK).

In *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC), the issue is whether the company as the bank's customer owed the duty of care in tort to his bank to examine his bank statements so as to be able to detect forgeries. Lord Scarman delivered the judgment of their Lordship of the judicial Committee of the Privy Council in relation to the nature and extent of the duty of care owed by a customer to his bank in the operation of a current account. Considering Lord Scarman's statement thoroughly, he raised the question that "Whether English law recognizes today any duty of care owed by the customer to his bank in the operation of a current account..."<sup>414</sup> As to the question stated by Lord Scarman, their Lordships of the Judicial Committee of the Privy Council answered the question that the customer's duty in English law in relation to forged checks is limited in twofold: first, a duty to refrain from drawing a check in the manner that may facilitate fraud or forgery, and second, a duty to inform the bank of any forgery of a check purportedly drawn on the account as soon as he becomes aware of it.<sup>415</sup> From their Lordships' view, it is stated that if the bank wants to put a wider duty of care to the customer to take the reasonable care in operating a current account, the bank and his customer can agree a clear contractual terms binding obligation upon the customer to query his bank statement.<sup>416</sup> Their lordships further stated that it cannot believe that there is anything

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<sup>414</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC) 101 (appeal taken from HK).

<sup>415</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC) 107-08 (appeal taken from HK).

<sup>416</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC) 109-10 (appeal taken from HK).



to be beneficial for imposing a liability in tort where the parties are in a contractual relationship in particular to a commercial relationship.<sup>417</sup>

It is well to keep in mind that although there was the opinion of *Tai Hing Cotton Mill Ltd.*, as discussed before, there was also the appearance of some cases<sup>418</sup> that clearly recognized the concurrent tortious duty of care by adopting the *Hedley Byrne* doctrine of assumption of responsibility. In addition, there is the view that support the application of the assumption of responsibility doctrine as a mechanism in fulfilling the gap in contract law such as the restriction of the concept of consideration and privity of contract under English contract law.<sup>419</sup>

### **C. The Recognition of Concurrent Tortious Liability to a Third-party Beneficiary**

Concurrent tortious liability is also applied as the gap-filling mechanism when the court confronted with the problem under the principle of privity of contract. In *White v Jones* 1995 2 AC 207 (HL), the tort claim was available where the plaintiff was not the party who has entered into the contract with the defendant. In this case, the court held that the duty of care was owed by the solicitor to the plaintiffs who will be the intended beneficiaries under particular will.

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<sup>417</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC) 107 (appeal taken from HK).

<sup>418</sup> *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch 384; *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL) 181-82 (appeal taken from Eng.).

<sup>419</sup> See CLERK & DUGDALE, *supra* note 61, ¶ 8-87; see also *Williams v. Natural Life Health Foods Ltd.* [1998] 1 WLR 830 (HL) 837 (appeal taken from Eng.).

Also, the concept of the assumption of responsibility is invoked in *White*'s case in order to fill the gap whereby the third person who suffered the loss cannot sue in contract because of the doctrine of privity.<sup>420</sup> To fill the gap of contract law in *White*'s case, Lord Goff stated that

“... the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.”<sup>421</sup>

The important reason provided by Lord Goff that should be emphasized is that for the reason of privity problem, a tortious duty of care will be recognized only in limited circumstance where the court found that plaintiff could not have the opportunity to protect his economic well-being by using contractual mechanism. We can observe that when the plaintiff is not in a position to protect himself upon contractual claim, courts are willing to solve privity problem by recognizing a duty of care in tort between defendant and non-contracting party provided that the contract is intended to benefit non-contracting party.<sup>422</sup>

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<sup>420</sup> See BURROWS, *supra* note 151, at 267.

<sup>421</sup> *White v. Jones* [1995] 2 AC 207 (HL) 268 (appeal taken from Eng.).

<sup>422</sup> See O'Sullivan, *supra* note 382, at 173.

**D. The Scope of Recoverable Damages in Concurrent Tortious Liability May Be Limited to the Rule of Contract.**

It appeared that there exist the cases where the court recognized the existence of the concurrent liability in both contract and tort but the court limited the plaintiff's right to take advantage of the more generous rules for remoteness of damage available in tort.

In *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.* [1997] AC 191 (HL) that comprised of three cases, defendants as valuers, were required by the plaintiffs to value properties on the security of which they were considering advancing money on mortgage. Later, it appeared that defendants considerably overvalued the property causing the loss to the plaintiffs who made the loans. And, in each case, the plaintiffs brought actions against the defendants claiming that defendants were in negligence and breach of contract. The court held that the cause of action meets the requirement both in contract and tort. As it is stated in Lord Hoffmann's opinion that:

“Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145. But the scope of the duty in tort is the same as in contract.

“A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered.”<sup>423</sup>

“...the scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender

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<sup>423</sup> *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.* [1997] AC 191 (HL) 211 (appeal taken from Eng.).

obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.”<sup>424</sup>

It is noticeable that this concurrent case begins to apply the same limitation of the scope of duty in respect of the kind of loss suffered in tort as that applied in contract.

Taking *Wellesley Partners LLP v. Withers LLP* [2015] EWCA Civ 1146; [2016] Ch 529 (CA) as another example, the court held that the defendant firm of solicitors had been professionally negligent for misdrafting a limited liability partnership agreement and the court, however, applied the contractual test for recoverability of damage for economic loss. The court further explained and concluded in Lord Floyd LJ’s opinion that:

“contractual and tortious duties to take care in carrying out instructions exist side by side, the test for recoverability of damage for economic loss should be the same, and should be the contractual one. The basis for the formulation of the remoteness test adopted in contract is that the parties have the opportunity to draw special circumstances to each other’s attention at the time of formation of the contract. Whether or not one calls it an implied term of the contract, there exists the opportunity for consensus between the parties, as to the type of damage (both in terms of its likelihood and type) for which it will be able to hold the other responsible. The parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation. It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.”<sup>425</sup>

The argument for the application of the remoteness test and for the court’s conclusion is supported by the scholar’s view in his footnote 57 of *McGregor on Damages*.<sup>426</sup> It is submitted that the victim of the case of concurrent professional negligence should not be allowed to rely on

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<sup>424</sup> *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd.* [1997] AC 191 (HL) 212 (appeal taken from Eng.).

<sup>425</sup> *Wellesley Partners LLP v. Withers LLP* [2015] EWCA Civ 1146; [2016] Ch 529 (CA) 553-54 (appeal taken from Eng.).

<sup>426</sup> HARVEY MCGREGOR, *MCGREGOR ON DAMAGES* ¶ 19-008 (18th ed. 2009).

the wider tortious test of reasonable foreseeability and ignore the stricter contractual test of contemplation of the parties, in particular, when the pure economic loss is allowed in tort of negligence<sup>427</sup> This is because the victim is the party to the contract, not a stranger and the parties should be bound by the risk they have allocated under their contractual relationship.

It is worth noticing that this case raised the significant viewpoint as to the difference in the tests for remoteness of damage between the two causes of action. Obviously, it has long been conceded that according to Lord Goff's statement in *Henderson's* case, one of the practical issues or problems of concurrent liability is the difference in the tests for remoteness of damage between contract action and tort cause of action. Nevertheless, the test for remoteness of damage in cases of concurrent liability was not an issue before their Lordships in *Henderson*, but the issue was whether there was in fact a concurrent cause of action in tort at all. In *Wellesley's* case, the concurrent tort cause of action remains actionable but the scope of damages is limited. So it is likely that after *Wellesley's* case, the court might equate the scope of revocability of pecuniary loss in tort and in contract by applying the contractual test of remoteness to concurrent tort claim. More interestingly, it is suggested by one scholar that tortious liability and contractual liability are parallel and essentially subject to the rules of their respective liability regimes.<sup>428</sup> It is also true even in this *Wellesley's* decision. However, the reasonably foreseeable losses of the tort are limited by the reasonably foreseeable losses under the contract regime in the case where the tortious duty derived from the contractual duty.<sup>429</sup> This application of remoteness

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<sup>427</sup> See MCGREGOR, *Id.* ¶ 19-008.

<sup>428</sup> Goh Yihan & Yip Man, *Concurrent Liability in Tort and Contract: An Analysis of Interplay, Intersection and Independence*, 24 TORTS L. J. 148, 161 (2017).

<sup>429</sup> See Yihan & Man, *Id.* at 162.

rule does not mean that tort regime is trumped by contract regime.<sup>430</sup> It is thus submitted that the consequence of the application of two independent set of remoteness rule depends on the precise fact situation in which concurrent liability in tort and contract has arisen.<sup>431</sup>

### **E. Summary**

Similar to U.S. law, English law recognized the freedom of election between an action of tort and one of contract particularly an action for the recovery of physical harms to a person or property. However, English law strictly imposes the tortious duty of care where the plaintiff asks for pure economic loss arising from the negligent acts or omissions of contracting party. Consequently, English courts invoked the principle of assumption of responsibility to allow the plaintiffs to be entitled to pursue concurrent tort claim for the recovery of pure economic loss. The assumption of responsibility doctrine required proof of special or professional relationship between the parties whereby one party paid the other party for advice, reports or plans on which he would rely. Accordingly, courts strictly put the duty to the builders or manufacturers to take the reasonable care in providing the defective things to the other party. In addition, the tortious duty of care may be denied by the effect of the specific duty imposed by the contract. More importantly, although there exists the professional relationship between the party, English courts have the tendency to deny tortious duty if it is considered to be inconsistent with the contractual terms especially any forms of enforceable exculpatory provisions. And it appears that English courts are likely to protect the parties' expectations by applying the more rigorous test of remoteness of contract law to grant the recoverable damages in concurrent tort claim. All in all,

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<sup>430</sup> See Yihan & Man, *Id.* at 172.

<sup>431</sup> See Yihan & Man, *Id.* at 172.

in any cases of concurrent claims, we may conclude that English court considered issue of limitation period, consideration and privity of contract as merely the technical aspects of contract law preventing plaintiffs from suing for breach of contract. In considering such issues, it appears to be that courts are willing to allow plaintiffs to sue in tort instead as long as the tort liability is not excluded by the others relevant rules and principles.

## **VI. COMPARATIVE ANALYSIS OF CONCURRENT LIABILITY**

In both U.S. and English laws, it is no doubt that where one contracting party's conduct causes harms to the other party, non-breaching party can rely on contract action in most cases. Conversely, it has long been controversial regarding the right to elect to sue in tort instead of asserting contract claim when there exists the contractual relationship between the parties. By considering the differences between contractual and tortious liability in chapter two, we can see some aspects of contract law that are more advantageous than those of tort law. Therefore, in such situations the plaintiff definitely prefer action in contract to tort. And of course, there are many justifications for suing in contract so long as such contract terms are enforceable. However, there may be the gaps under contract law such as the absence of privity that bring about the need to rely on tort law instead. In addition, the tort action may provide more advantages in terms of the recovery of greater damages or of other technical issues such as the issue of limitation period. One may think that for the sake of certainty and consistency it is more plausible to allow the plaintiff to rely on just only contract claim in all situations. But we cannot deny that in some situations, the contracting party also deserves to be protected under tort law at the same time. Moreover, it appears that the parallel tort liability in contract is recognized in both U.S. law and English law. The juridical decisions and academic views in both legal systems also have the important influence on the recognition of concurrent liability between

contract and tort. However, all views are based on the rules of contract and tort law in their legal systems which are different in some respects. The development of contract law either in the form of common law or statutory law has played the crucial role in developing concurrent tort claim in both systems as well. As can be seen, the contracting party is certainly entitled to assert tort claim as the elective right in both U.S. and English jurisdictions.

In U.S. jurisdiction, even though concurrent liability is recognized, it is obvious that the breach of contract cannot also be a tort in every case. There are the restrictions especially in cases where the plaintiff asks for the recovery of his economic loss. This is because U.S. contract law has long been governed by the economic loss rule. In the cases where the concurrent tort of negligence is brought for recover economic loss, U.S. law requires the existence of special relationship between the parties to allow such claim. In other words, in the case of professional negligence, U.S. court has permitted tort action for pure economic loss. For such exception, the clear criteria for determine whether the defendant is one of the professionals are required. In addition, it is generally excepted that attorney or counsel against whom the legal malpractice claim is brought can be seen as the professional. Nevertheless, the plaintiff in legal malpractice claim must plead his claim and prove the elements of legal malpractice action with caution to make his claim meet all essential elements of professional negligence action. As such, to consider the issue of concurrent tort claim for economic loss raised by the party in other kinds of relationship, we may consider and apply the criteria discussed in some lawsuits claimed by clients against attorneys. This is because legal malpractice claim can be seen as the common example in some respects in relation to the concurrent tortious action for economic loss.

Additionally, U.S. courts develop the rule of independent duty and choose to apply such rule rather than make a reference to pure economic loss rule. As a result, the concurrent tort



claim for economic loss is actionable when the court believes that the gravamen of the complaint gives rise to the duty of care which is independent of the contract. We can observe that by adopting the independent duty doctrine, the court may extend the application of such rule to impose concurrent tortious duty to the parties of the contract beyond the professional relationship. This approach tends to be less strictly in recognizing the concurrent claim in U.S. law.

Apart from the independent duty doctrine and the existence of special relationship in professional malpractice claim, U.S. court establishes the concept of bad faith breach of contract that amounts to tort liability especially insurer's tortious liability in insurance contract. Yet, the court has emphasized and relied on the test of the existence of the special relationship between insurer and insured to hold that a tort action is available for breach of the covenant in an insurance contract. So this kind of special relationship that is characterized by the elements of public interest, adhesion, and fiduciary responsibility remains restrictive for the recognition of this kind of tort liability in other relationships so long as other relationships have similar characteristics with the insurance contract.

In effect, there is an attempt to restate the certain rules with regard to tort liability for economic loss arising from contract (Economic Loss Rule) by the American Law Institute. The main principles have been restated in the tentative drafts No. 1 (§§ 1-6)<sup>432</sup> and tentative drafts No. 2 (§§ 6-8).<sup>433</sup> This work is aimed at looking on torts that involve economic loss, or

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<sup>432</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (AM. LAW INST., Tentative Draft No. 1, 2012).

<sup>433</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (AM. LAW INST., Tentative Draft No. 2, 2014).

pecuniary harm not resulting from physical harm or physical contact to a person or property.

Sections 1 through 5 of Chapter 1 of the tentative drafts No. 1 were approved by the membership at the 2012 Annual Meeting of the Members of the American Law Institute.

In brief, according to this Restatement, Economic Loss is defined to cover the pecuniary damage not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property.<sup>434</sup> It is provided in Section 3 that:

“Except as provided elsewhere in this Restatement, there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.”<sup>435</sup> This rule clearly states that when a party is negligent in performing a contract causes economic loss to the counterparty, the injured party's remedies are determined by other law: principally the law of contract that has the specific purpose of allocating economic losses that result from the performance of contracts.

This Restatement still recognizes the well-established exceptions to the economic loss rule in the case of professional negligence. Such exception is addressed in § 4 of this Restatement. That is the tort liability of professionals to their clients alongside the contract between them. It is stated in § 4 that “A professional is subject to liability in tort for economic loss caused by the negligent performance of an undertaking to serve a client.”<sup>436</sup>

So according to the Restatement, the action to recover for professional negligence or malpractice action is still a prominent exception to the economic loss rule. It is reasoned that

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<sup>434</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 2 (AM. LAW INST., Tentative Draft No. 1, 2012).

<sup>435</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 3 (AM. LAW INST., Tentative Draft No. 1, 2012).

<sup>436</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 4 (AM. LAW INST., Tentative Draft No. 1, 2012).

firstly, it is not always true in the relationship between a client and a professional that they negotiated on equal footing to allocate their risks and secondly, the promises of professionals tend to be limited to careful efforts rather than results.

Importantly, these Restatement rules will reduce the confusion that can result when a party brings concurrent suit on the same facts under contract and tort theories asking for economic loss that are largely redundant in practical effect. However, adopting these rules may bring back the traditional approach that adheres to the strict economic loss rule. As a consequence, the independent duty doctrine may be ignored and ultimately abandoned.

U.S. law also recognized the third party's right to bring concurrent tort claim against the contracting party who is in breach of contract in the absence of privity of contract. However, the third party's right to tort liability in concurrent case is granted only in limited circumstances. The court has to balance all relevant factors to show both the relationship between the defendant and a third-party beneficiary and the public policy concerns such as those of all stated in *Heyer v. Flaig* case.

In tort of negligence case, it is inclined that the public policy concerns play important role in imposition of tortious duty of care together with the contractual obligation. The court tends to interpret the contract in the way that create fairness and reasonableness between the parties. We can imply that without the requirement of fairness or reasonableness, the court may limit the duty owed by party only to the contract regime unless there exist the certain circumstances falling in the scope of other rules and doctrine that are stated above.

Remarkably, when courts confronted with the issue of limitation period in concurrent claim, for the policy of the statute of limitations,<sup>437</sup> courts tend to consider the gravamen of allegations rather than the form of action chosen by the plaintiff to determine whether the action sounds in contract or in tort. Moreover, U.S. court applied the statute limitations of tort liability when the court found that the action sounds in tort even though the plaintiff voluntarily elect the form of contract claim. From my viewpoint, though U.S. law allows the plaintiff to plead the facts on any cause of action which would fit them in the concurrent situation, U.S. courts have a tendency to hold that the plaintiff's claim sounds in contract or in tort by considering the “gist” or the “gravamen” of the action particularly when the court determines the issue of substantive law. This situation could be the cases that the court confronts with either the question of the statute of limitations or the issue of an appropriate measure of damages to be applied in granting the relief.

In comparison to English law, there has no apparent rules as to the restriction on concurrent tortious liability in cases where the imposition of tortious duty will be inconsistent with the terms of contract.<sup>438</sup> However, U.S. court may rely on the freedom of contract doctrine to enforce the terms of contract that reflect the parties' intent to exclude their liability either contractual liability or concurrent liability in tort provided that the contractual terms do not violate any other laws or unconscionability doctrine. It is likely that the U.S. courts do not treat the terms of the contract which limit the amount of damages or the requirement of notice of a claim within a time limit as the one being inconsistent with tort. But it would be reasonable and

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<sup>437</sup> See PROSSER, *supra* note 280, at 440; *Balt. & O. R. Co. v. Reed*, 223 F. 689 (6th Cir. 1915); *Handtoffski v. Chi. Consol. Traction Co.*, 274 Ill. 282, 113 N.E. 620 (1916); *Vandevour v. Se. Greyhound Lines*, 152 F.2d 150 (7th Cir. 1945).

<sup>438</sup> *BB Syndication Servs., Inc. v. LM Consultants, Inc.*, No. 09-CV-1268, 2011 WL 856646 (N.D. Ill. Mar. 7, 2011).

fair if courts have allowed tort action and have held to apply such terms to tort action as well.<sup>439</sup>

This is because it reflects the parties' intent to be bound by contract and protects the bargain the parties have made. Contrary to English law, it does not clearly appear that the court limits scope of remedies in tort by using the same test for recoverability of damage in contract claim.

After considering the rules of concurrent claim in U.S. jurisdiction, we can see that the more the nature and limitations of the tort action arising out of a breach of contract are clearly defined and illustrated, the more efficiently the plaintiff can deal with his complaint in order to sustain his preferable cause of action.

Turning to English jurisdiction, English law gives elective right to the plaintiff in asserting either contract action or tort claim. Similarly, plaintiff's right to economic loss in tort claim is highly criticized and recognized only in certain circumstances. English law allows concurrent tort claim under the doctrine of assumptions of responsibility. Similar to U.S. law, under the principle of assumption of responsibility, English court mainly focuses on the special relationship between the parties in order to hold that the defendant is liable for economic loss in concurrent claim of negligence.

Remarkably, even if the assumption of responsibility is established in *Hedley Byrne's* case where the plaintiff and the defendant are in the relationship that is equivalent to contract. It appears that such doctrine is applied as a fortiori in order to support the duty of care in tort in the case where there is the contractual relationship between the parties. So in order to bring suit in

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<sup>439</sup> See PROSSER, *supra* note 280, at 445-46; see also *Libby v. St. Louis, I. M. & S. Ry. Co.*, 137 Mo. App. 276, 117 S.W. 659 (1909); *Henderson v. Canadian P. Ry. Co.*, 258 Mass. 372, 155 N.E. 1 (1927); *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195 (3d Cir. 1995).

tort against the counterparty, plaintiff has to show enough facts in proving the existence of the assumption of responsibility between them. And we can see that *Henderson's* case is taken as the leading authority on concurrent liability in professional negligence. Later, the doctrine of assumption of responsibility is regarded as the conceptual basis for the recognition of all professional persons' concurrent tortious liability for economic loss to their clients such as engineer's duty<sup>440</sup> and the medical practitioner. Notably, although the English courts did not clearly refer to public policy concerns to allow the concurrent liability in tort, as can be seen in some cases the court invoked the concept of assumption of responsibility for the purpose of the limitation period issue at bar.

However, there exists the scepticism about the assumption of responsibility doctrine. It is submitted by Lord Jackson LJ that the law on concurrent liability should be redefine. Lord Jackson suggests that contracts should not generate duties of care in tort that is identical to the contractual obligations.<sup>441</sup> In effect, there exist the restrictions on the recognition of concurrent tortious liability for economic loss under the assumption of responsibility doctrine in respect of different underlying rationales that are described in chapter five.

Similar to U.S. law, English law also recognized concurrent tortious liability because of the effect of the privity of contract doctrine. English jurisdiction now has its own legislative contract law to protect rights of third party. The limited exceptions to the privity doctrine are

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<sup>440</sup> *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 AC 1 (HL) (appeal taken from Eng.).

<sup>441</sup> Lord Justice Jackson, *Concurrent Liability: Where Have Things Gone Wrong*, 1, 1 (2014), <http://www.judiciary.gov.uk/wp-content/uploads/2014/10/tecbarpaper.pdf>; see also *Robinson v. PE Jones (Contractors) Ltd.*, [2011] EWCA Civ 9; [2012] QB 44 (CA) 62 (appeal taken from Eng.).

addressed in the Contracts (Rights of Third Parties) Act 1999. Under this act, a third party may enforce a contractual term, only if (a) the term expressly so provides or (b) the term purports to confer a benefit on him. When the rights of third party are clearly recognized in this act, this may lead to the tendency for the court to strictly impose the tortious duty of care on the contracting party to the third party. At least, the rights of third party in tort claim may be limited only to the same conditions imposed in the act. Additionally, it is submitted that tort law should not step in and should not impose duty on contracting parties to third person if the parties to the contract do not confer rights on third parties, by using the mechanism of the Contracts (Rights of Third Parties) Act 1999<sup>442</sup>

Looking, particularly, at the issue of exculpatory clauses, English court is likely to deny tortious duty if the duty of care in tort is inconsistent with the terms of contract. As we have perceived that in general, the freedom of contract doctrine allows the parties to freely agree to exclude or limit liability for their breach of contract provided that such provisions do not violate any statutory restrictions, such as the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015. English courts have decided that it would be unreasonable if contracting parties are permitted to evade the effect of exclusion or limitation clauses by suing in tort rather than in contract. And whenever the court encounters the issue of validity of exculpatory terms, the court can rely on applicable rules of either the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015 that have the specific purpose to deal with the unfair contract term between the parties as the case may be. So we can observe that when contract terms are enforceable under this act, it would bring about a fair and reasonable legal effects to the parties if the court decide to adhere to the agreement between them to protect their bargain of interest. This is the reason

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<sup>442</sup> See Jackson, *Id.* at 14.

why English law does not impose concurrent tortious duty when duty in tort would be inconsistent with such contractual provisions.

In addition, it is noteworthy that the liquidated damages are available only for breach of contract. If the court allows the plaintiff to recover more quantum of damages in tort, plaintiff's right to recoverable damage in tort will be inconsistent with the principle of contract law and contrast with the parties' express intention. Therefore, the court may analogously treat the enforceable term of liquidated damages as one of the restriction on the plaintiff's right to rely on tort claim as well.

Form my viewpoint, English courts have allowed the concurrent tort claim with caution. Moreover, the judgments permitting concurrent liability have been considered as pragmatic consideration. As we can see in chapter five, English courts are inclined to limit the concurrent tort claim in some respects. First, English court denied concurrent tortious duty of care in building contract in relation to defective things giving rise to pure economic loss. The court gave the reasons by distinguishing the builder and manufacturer from the professional relationship whereby one party paid the other party for advice, reports or plans on which he would rely and establishing an indication to consider whether something that is supplied by one party causes the injury to person or other things or not. Second, there is the decision that the court attempted to strictly interpret the contractual duty and limited duty of care not to be more extensive than the duties imposed by the contract.<sup>443</sup> Third, the court recognized the existence of the concurrent tortious liability on the condition that the plaintiff's rights to the scope of damages

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<sup>443</sup> *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] AC 80 (PC) (appeal taken from HK).



in tort claim will be governed by the same contract rule of remoteness in the situation where tortious duty derives from contractual relationship.<sup>444</sup>

In conclusion, it is apparent that law of contract and tort law under either U.S. law or English law are not entirely separate but are linked in respect of the concurrent situation. We can notice that the tort liability particularly tort of negligence under both U.S. law and English law is not so extensive even if the concurrency is permitted. As we can see, even though each legal system generally recognizes the concurrent tort claim particularly claim of negligence for personal injury, this does not mean that the contracting party is entitled to rely on tort claim in all situations. This is because there are also the restrictions upon the imposition of concurrent tort liability especially in the cases where plaintiff brings lawsuit to recover pure economic loss. In addition, it is likely that imposition of the concurrent tortious duty is more rigorously restricted under English law than U.S. law in some respects.

## **VII. CONCLUSION**

Most of the concurrent situations occur in the cases where 1) the plaintiff asks for the recovery in tort claim despite the existence of contractual relationship or 2) the plaintiff asserts contract claim but the defendant contends that the issue at bar especially the issue of limitation period should be governed by tort law rather than contract law. In such situations, the court will encounter the question as to whether the plaintiff's allegation sounds in tort rather than in contract or vice versa. By considering the differences between the contract law and tort law on the right to remedies, it appears that neither action is exclusively more advantageous than the

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<sup>444</sup> Banque Bruxelles Lambert SA v. Eagle Star Insurance Co. Ltd. [1997] AC 191 (HL) 211 (appeal taken from Eng.); Wellesley Partners LLP v. Withers LLP [2015] EWCA Civ 1146; [2016] Ch 529 (CA) 553-54 (appeal taken from Eng.).

other. Therefore, the more valuable consequences of such rules have the influence on plaintiff's election of his claim when the concurrent situation occurs. Moreover, it was found that the preferable type of damages recoverable (e.g., damages for emotional distress, punitive damages), the more advantageous statute of limitation in tort law, the strict application of privity of contract doctrine, and the restriction on exclusion of tort liability have influenced on the election of tort claim.

Under common law system, it is the entirely the court's discretion to recognize the concurrent tort liability unless there is the explicit prohibition by the legislature. Both U.S. and English generally recognize concurrent tort claim as an elective right. However, courts must have the justified rationales either to allow the plaintiff's tort claim or to apply tort rules according to the defendant's defense in order to protect parties' expectation, create justice and reinforce public policy.

Most of the cases in U.S. and English jurisdictions, courts held that the plaintiff's allegation sounds in tort rather than in contract by considering the "gist" or the "gravamen" of allegations notwithstanding plaintiff's choice of action. In particular, where the plaintiff asserts the claim to recover physical injuries to person or to property in negligence cases, courts are very likely to permit tort claim and apply tort rules to the issues disputed rather than contract rules. Furthermore, the issue of limitation period and the privity doctrine are considered as merely the technical aspects in the concurrent situation. U.S. and English courts is thus inclined to allow plaintiff to rely on tort law if such rules of contract law preventing plaintiffs from suing for breach of contract.

There are also the restrictions on the permissive rule of concurrent claim particularly in the cases where the plaintiff brings lawsuit claiming for the pure economic loss. After exploring both relevant U.S. and English cases as well as academic writing, there appear the critical limitations on the rights to tort claim as follows:

Firstly, it is generally accepted by both U.S. and English courts that the recovery for economic loss is limited only in contract claim. However, U.S. law established the exceptions to the economic loss rule in the cases of professional negligence and of bad faith breach of contract. Nevertheless, the latter one is mainly limited only in the relationship in insurance contract. Additionally, some courts are attempting to develop and apply the independent duty doctrine to permit more tort claims of negligence especially for economic loss. Similarly, English law invokes the principle of assumption of responsibility to impose tortious duty of care owed by the defendant to the plaintiff. Under the assumption of responsibility, the special relationship between the parties is mainly required in order to grant the award to the plaintiff who assert concurrent claim of negligence for economic loss.

Secondly, it is clear that under English law, the tortious duty of care can be excluded or limited by the exculpatory clause or contractual term of liquidated damages. There exists the refusal of imposing the duty of care which is inconsistent with what the parties have agreed in their contract. As to this kind of limitation, it is not apparent that U.S. courts entirely refuse to impose tortious duty of care which is inconsistent with what the parties have agreed in their contract. However, it is submitted that courts will not let the plaintiffs suing in tort to get around the exculpatory clause that they voluntarily agree to allocate their risks in particular to the risk arising from their negligent conduct. As for this reason, I would also propose that it would be fair, just and reasonable if U.S. courts apparently adopt and apply this kind of limitation to

restrict concurrent tort claim in U.S. jurisdictions. This is because U.S. law clearly recognizes freedom of contract doctrine. To sustain such doctrine, the court should not give the plaintiff rights under tort law that leads to the severe violation of the fundamental rule of contract which has the dominant aim to protect the contracting parties' bargain of interest in allocation of their particular risk in the particular way so far as their interest is not outweighed by the mandatory law or public policy.

Thirdly, it is also suggested by scholars' views that the doctrine of efficient breach recognized in U.S. contract law should be taken into account in limiting the imposition of tort liability on the breaching party particularly in commercial transaction bound by the persons who are in the crucial role on the development of economic. As to economic perspective, if breaching party can prove that nonperformance is economically efficient, it is socially acceptable. Therefore, the party in efficient breach of contract should not be punished by his breach. Recognizing tort claim that puts more burdensome on the breaching party in the case where efficient breach occurs would lead to the destruction of well-established concept of efficient breach and also bring about the unreasonable consequences. Therefore, I would suggest that U.S. courts should take such economic perspective as a factor being considered in permitting concurrent tort claim in order to protect public economic interest in general. However, there is also the view that tort liability may be imposed to prevent an opportunistic breach of contract. One evidence of this view is the recognition of bad faith breach of insurance contract cases. Therefore, I would suggest that the concept of bad faith breach should not be limited only in an insurance contract. This is because U.S. law essentially recognizes that every contract contains an implied covenant of good faith and fair dealing. If the parties to the other kinds of contracts can prove that there exists special relationship between them, tortious liability should be allowed

when it appears that one party do something which injures the right of the other in order to receive the benefits of the agreement. As the U.S. courts have already provided that special relationship in bad faith breach of contract case is characterized by the elements of public interest, adhesion, and fiduciary responsibility, courts could consider such factors to find the similar characteristic of relationship in other contracts as well.

Lastly, in English jurisdiction, although courts generally allow the plaintiff to rely on tort claim, some courts have a tendency to limit the scope of recoverable damages in concurrent tort claim by applying the similar test of remoteness of the breach of contract claim to the tort claim. If this approach is prevalent in the most of concurrent cases, the difference in the remoteness test of damage between contract action and tort action will no longer affects the plaintiff's choice of claim. I think this restrictive approach aims at the protection of the parties' expectation interest rather than deterrence the wrongful conduct. As for such reason, I would suggest that the limitation on the scope of recoverable damages is justifiable only in the case where the tortious duty exists by virtue of a contract. This means that in the case where the duty mainly exists by the virtue of provision under a statute or the case where the duty exists independently of contractual terms, the court should apply the independent set of remoteness rule of tort irrespective of the consequence of the application of remoteness rule of contract. This is because in such cases tortious duty is imposed by law itself and also arises independently from the contractual duty. Allowing the plaintiff to take advantage of the more generous rules for remoteness of damage available in tort does not create an unreasonable or undue intrusion of contracting parties' expectation interest. Therefore, for the sake of certainty and consistency, English courts should distinguish the precise fact situations in which concurrent tortious liability has arisen and apply an appropriate remoteness rules to that particular factual situation.

In conclusion, the plaintiff's right to remedies in tort claim is generally recognized in U.S. and English systems. The existence of contractual relationship cannot entirely preclude the plaintiff from the protection under tort law. However, some limitations on concurrent tort claim are also necessary not only to sustain the fundamental and crucial rule of contract but also to prevent an undue intrusion into the bargain-relationship by tort- a theory of non-consensual liability.

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